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Common Law Constitutionalism and the Oath of Governance: An Hieroglyphic of the Laws

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COMMON LAW CONSTITUTIONALISM AND THE OATH OF GOVERNANCE: "AN HIEROGLYPHIC OF THE LAWS"[1]

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1. Calvin's Case, 7 Co. REP., 1a, at 11b (K.B. 1610) ("a King's Crown is an hieroglyphic of the laws").

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I. INTRODUCTION

Monarchs of England, and later of Great Britain, the United Kingdom, the Empire, and of Commonwealth nations, have always been recognized by the people, and taken an oath of governance.[3] The fundamental principles of the oath have been to govern according to laws and customs; to judge with equity, justice and mercy; to maintain the laws of God, and to maintain the peace. So long as English law has existed, it has been in symbiotic relationship with the powers given by the oath. This Article argues that the oath of governance is the well-spring of all power necessary and sufficient to govern; and that therefore, all law depends from it. In this context, the Article will investigate exactly what this common law is. This inquiry has become more pertinent with the development of the new theory, growing out of judicial review in the United Kingdom and the exercise of the judicial power, of "common law constitutionalism."

Through an historical and constitutional analysis, this Article argues that the understanding of those scholars is fundamentally flawed in concentrating their theoretical analysis on what they perceive to be the supremacy of the common law as articulated by the courts. It is argued that since all power to make law is dependant on the oath of governance, no supremacy can be given to one kind of law over another, and that indeed, "common law" as constitutionally understood, is not confined to judge-made law. Nor did the "common law" suddenly emerge fully formed, wise and armed, in the time of Henry II like Pallas Athene from the brow of Zeus. There had long been law common to the English from Anglo-Saxon times—the lack of consideration of the role Anglo-Saxon laws has played in the evolution of the common law can be attributed, it is submitted, to the disjunction between "legal" history and "constitutional" history, and to a narrow professional mindset when considering the evolution of the law, often misinformed as to the historical and constitutional circumstances within which it grew. While the debt to very many scholars will be obvious from the footnotes, particular tribute is paid here to the work of the late Patrick Wormald.

3. This is true of all persons said to be monarchs except Edward Plantagenet, son of Edward IV, and Edward of Windsor, son of George V; there is also some doubt as to whether Edward IV took the oath. If no oath was taken, then at law in my view, they were no monarch. After the English Coronation Oath Act, 1688, 1 Will. & Mary c. 6, (Eng.), and the Act of Settlement, 1701, 12 & 13 Will. 3, c. 2 (Eng.), statute also required the taking of the oath for a person to be monarch. . For an historical and constitutional substantiation of this premise, see M.R.L.L. KELLY, KING AND CROWN : AN EXAMINATION OF THE LEGAL FOUNDATION OF THE BRITISH KING, unpublished Doctoral Dissertation, 1998, Macquarie University Library. For a discussion in the Australian context, see MRLL Kelly, *The Queen of the Commonwealth of Australia*, 16(1) AUSTRALASIAN PARLIAMENTARY REVIEW, 150-175 (2001).

> In earlier centuries, legal scholars saw a clear connection between the monarch's oath, and all jurisdiction to make laws, and to ensure justice, peace, liberty and equity—Bracton, writing in the thirteen century in *The Laws and Customs of England*, immediately after setting out the oath of governance of the king, (Henry III)[4] states: To this end is a king made and chosen, that he do justice to all men.[5] . . .The king, since he is the vicar of God on earth, must distinguish *ius* from *injuria*, equity from iniquity.[6] Let him, therefore, temper his power by law, which is the bridle of power, that he may live according to the laws, for the law of mankind has decreed that his own laws bind the lawgiver, and elsewhere in the same source, it is a saying worthy of the majesty of a ruler that the prince acknowledge himself bound by the laws.[7] Nothing is more fitting for a sovereign than to live by the laws, nor is there any greater sovereignty than to govern according to law, and he ought properly to yield to the law what the law has bestowed upon him, for the law makes him king.[8]

Elsewhere, he wrote:

> Now we must turn to liberties [and see] who can grant liberties,. . . Who then? It is clear that the lord king has all dignities, It is the lord king himself who has ordinary jurisdiction and power over all who are within his realm.[9] . . . For todo justice, judgment and preserve the peace is the crown.[10]

and again:

> The king has no equal within his realm, [Subjects cannot be the equals of the ruler, because he would thereby lose his

4. For samples of the oaths of governance see *infra* Part VII, Annex.

5. 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 309 (GEORGE E. WOODBINE ed., SAMUEL E. THORNE trans., (Harvard College ed. 1977) (1968) [hereinafter BRACTON] ("*Ad hoc autem creatus est rex et electus, ut iustitiam faciat universes*"). While the attribution of the work to Bracton is of considerable antiquity, it now seems that the bulk of the work was written in the 1220s and 1230s by persons other than Bracton himself. It seems to have been edited and partially updated later in the late 1230s, with various additions being made to it between that time and the 1250s. The last owner of the original manuscript and the author of the later additions was probably Bracton—from Harvard Law School Library, http://hlsl5.law.harvard.edu/bracton/ (31 August, 2006) .

6. *Id.* at 2: 305 ("*Separare autem debet rex cum sit dei vicarius in terra ius ab iniuria, æquam ab iniquo*").

7. *Id.* at 2: 305-06.

8. *Id.* at 2: 306 ("*Item nihil tam proprium est imperii quam legibus vivere, et maius imperio est legibus submittere principatum, et merito debet retribuere legi quod lex tribuit ei, facit enim lex quod ipse sit rex*").

9. *Id.* at 2: 166 ("Of liberties and who may grant liberties and which belong to the king").

10. *Id.* at 2: 167 ("*Est enim corona facere iustitiam et iudicium, et tenere pacem, et sine quibus corona consistere*").

> rule, since equal can have no authority over equal.] nor *a fortiori* a superior, because he would then be subject to those subjected to him. The king must not be under man but under God and under the law, because law makes the king. Let him therefore bestow upon the law what the law bestows upon him, namely, rule and power; for there is no *rex* where will rules rather than *lex*.[11]

Blackstone in the eighteenth century noted that the king is "the fountain of justice and general conservator of the peace of the kingdom,"[12] a sentiment with which Sir Edward Coke agreed,[13] going so far as to say:

> In respect whereof [a quotation from Bracton] one saith, That *Corona est quasi cor ornans, cujus ornamenta sunt misericordia et justicia* [(the crown) is, as it were, *cor ornans* (an ornamenting heart), the ornaments whereof are mercy and justice]. And therefore **a King's Crown is an Hieroglyphick of the Lawes**, where Justice, &c. is administered; . . . *Coronam dicimus legis judicium esse, propterea quod certis est vinculis complicata, quibus vita nostra veluti religata coercetur* [We call the judgment the crown of the law, because it is tied up with certain bonds whereby our lives are coerced as if by ties.]. Therefore if you take that which is signified by the Crown, that is, to do Justice and Judgment, to maintain the Peace of the Land, &c. to separate right from wrong, and the good from the ill;. . .[14]

What does this mean? Essentially, all these writers agree that it is *law* which makes the king—but it is not the judge-made law which makes a king: it is the law grown up over centuries of monarch-making. It is the law of recognition by the people and the law as enunciated in the oath of governance. This oath is, as Bracton recognized, that which gives the monarch

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11. *Id.* at 2: 33 ("*PAREM autem non habet rex in regno suo, quia sic amitteret præceptum, cum par in parem non habeat imperium. Item nec multo fortius superiorem, neque potentiorem habere debet, quia sic esset inferior sibi subiectis, et inferiores pares esse non possunt potentioribus. Ipse autem* rex non debet esse sub homine sed sub deo et sub lege, *quia lex facit regem. Attribuat igitur rex legi, quod lex attribuit ei, videlicet dominationem et potestatem. Non est enim rex ubi dominatur voluntas et non lex.*") The words emphasised are the ones purportedly quoted by Coke out of context in Prohibitions del Roy. *See infra* text accompanying notes 43-49.

12. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, A FACSIMILE OF THE FIRST EDITION OF 1765-1769 *257 (University of Chicago Press, Chicago, 1979).

13. SIR EDWARD COKE, Introduction to the Seventh Reports, 7 CO. REP. 1a, 77 E.R. 377-411, 377 (K.B. 1610) ("in the sixth year of the most High and Most Illustrious JAMES, King of England, (etc.) the Fountain of all Piety and Justice, and the Life of the Law"); and also to the Fifth Reports of cases decided under Elizabeth I—'. . .Queen Elizabeth, the Fountain of all Justice and the Life of the Law,' from Frontispiece of 'The Fifth Part of the Reports.'

14. *Calvin's Case*, 7 CO. REP. at 11b (italics in original, boldface added); 1 STEVE SHEPPARD, THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 193 (Liberty Fund, Indianapolis, Indiana, 2003) (translation of Latin in *Calvin's Case* in brackets).

"rule and power" to govern all the people, while simultaneously circumscribing those powers by constraining power to the ends of justice, right, and peace. This law has been common to monarchs for over a thousand years; this law has applied in common to all the English peoples, and in a real sense the oath of governance is, as Coke also realised, both the circumference and representation of all law. This law is in this writer's submission, the real "common law constitutionalism."

II. "COMMON LAW CONSTITUTIONALISM": THE ISSUES

Much recent scholarship has concentrated upon the enunciation of a far different theory of "common law constitutionalism," particularly in the field of administrative law and judicial review.[15] "Common law constitutionalism" can perhaps be best described as a theory whose essence is "the reconfiguration of public law as a species of constitutional politics centred on the common law court,"[16] whereby "the common law court stands at the centre of a scheme of constitutional politics that is paramount within the political community and that the primary mechanism by which such a politics operates is through the process of judicial review."[17] In such a theory, "*[j]udge made law. . .*becomes. . .a 'higher-order law to which even parliament is subject';"[18] and therefore,

> the common law *must* serve as a constitutional framework and expression of the community's most important values. It therefore enjoys superiority to legislation in the sense that a statute must be interpreted consistently with deep-rooted common law principles. . .[19]

In turn, concern about the potential for displacement of the democratic nature of the political polity by the theory (as has certainly been

15. *See, e.g.*, Sir John Laws, *Law and Democracy*, 1995 PUB. L. 72; Sir John Laws, *The Constitution; Morals and Rights*, 1996 PUBLIC LAW 622; T. R. S. ALLAN, CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW, (Oxford University Press, Oxford, 2001); *see also*, especially in the context of judicial review, T. R. S. Allan, *Legislative Supremacy and Legislative Intent: A Reply to Professor Craig*, 24 OXFORD J. LEGAL STUD. 563-583 (2004); Paul Craig, *Legislative Intent and Legislative Supremacy: A Reply to Professor Allan,* 24 OXFORD J. LEGAL STUD. 585-596 (2004); T. R. S. Allan, *Constitutional Dialogue and the Justification of Judicial Review*, 23 OXFORD J. LEGAL STUD. 563-584 (2003); Paul Craig, *The Common Law, Shared Power and Judicial Review*, 24 OXFORD J. LEGAL STUD. 237-257 (2004); Paul Craig, *Constitutional Foundations, the Rule of Law and Supremacy*, 2003 PUBLIC LAW 92-111; T. R. S. Allan, *The Constitutional Foundations of Judicial Review : Conceptual Conundrum or Interpretative theory?* 2002 CAMBRIDGE L. J. 87.

16. Thomas Poole, *Back to the Future? Unearthing the Theory of Common Law Constitutionalism*, 23 OXFORD J. LEGAL STUD. 435-454, 439 (also referencing the development by writers of notions of "common law constitutionalism").

17. *Id.* at 447.

18. *Id.* at 448 (quoting Sir John Laws, in *Law and Democracy*, *supra* note 15 at 84 (emphasis added)).

19. T. R. S. Allan, *The Rule of Law as the Rule of Reason: Consent and Constitutionalism*, (1999) 115 L.Q. REV. 221 at 241-242 (emphasis added).

envisaged by judges[20] and legal academics[21] alike) has sparked some disagreement between the proponents of "common law constitutionalism,"[22] particularly those who see democracy and constitutional theory as being "communitarian" rather than "majoritarian,"[23] and outright opposition from other scholars who champion the doctrine of "the sovereignty of Parliament."[24]

A. Crooked Cords

That the theory of common law constitutionalism as espoused by its proponents is inherently political in itself can be exemplified by the *Festschrift* to Sir William Wade—*The Golden Metwand and the Crooked Cord.*[25] The editors state that they chose this title based on the observations of Sir Edward Coke.[26] They quoted elliptically what Coke had said:

"A good caveat to Parliaments to leave all causes *to be measured* by the golden and streightmetwand of the law, and not to the incertain and crooked cord of discretion."[27] But Coke there was referring to the discretion vested *in judges* by an Act of Parliament,[28] enabling judges to hear and determine certain offenses without a jury trial, not to the discretion of either members of the Houses nor to that of members of the executive, and noted that parliament had later repealed this Act.[29] Indeed, the statute referred clearly to the "justices of assize" and the "justices of the peace;"[30] the object of Coke's ire was, however, "those time-servers, Empson and Dudley"[31]—Privy Counsellors to Henry VII and prominent members of Henry's Council Learned in the Law which enforced through an equitable jurisdiction his fiscal policy, particularly through the enforced payments of debts.[32] (Coke's vehement antipathy to the equitable jurisdiction and his continual conflict with Lord Ellesmere is well known.) However, the clear

20. *E.g.,* Sir John Laws, *Wednesbury,* in THE GOLDEN METWAND AND THE CROOKED CORD, ESSAYS ON PUBLIC LAW IN HONOUR OF SIR WILLIAM WADE QC, C. 185-201 (FORSYTH AND I. HARE, eds., Clarendon Press, Oxford, 1998).

21. *E.g.,* J. Jowell, *Beyond the Rule of Law: Towards Constitutional Judicial review,* 2000 PUB. L. 671 at 675; see also the work of T. R. S. Allan.

22. *E.g.,* Allan, *supra* note 15, and Craig, *supra* note 15.

23. *E.g.,* T. R. S. Allan in GOLDEN METWAND, *supra* note 20, 15-37.

24. *E.g.,* JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT : HISTORY AND PHILOSOPHY, (Clarendon Press, Oxford, 1999).

25. FORSYTH AND HARE, GOLDEN METWAND, *supra* note 20.

26. Editors' Preface to GOLDEN METWAND, *supra* note 20, at vii.

27. 4 CO. INST., c.1, f. 41 (reproduced in 2 SHEPPARD, *supra* note 14, at 1143 (words in italics are omitted in the Preface).

28. 11 Hen. 7, c. 3

29. 1 Hen. 8. c. 6.

30. 4 CO. INST., c.1, f. 40; *see also* 2 SHEPPARD, *supra* note 14, 1142, 3 SHEPPARD, *supra* note 14, 730; *see also* 2 CO. INST., c. 29, ff.50-51 (*Magna Carta*); SHEPPARD, *supra* note 14., at 860.

31. 4 CO. INST., c. 1, f. 41 (*"Qui eorum vestigia insistunt, eorum exitus perhorrescant"* [Let those who follow in their footsteps be affrighted by their end]). Text reproduced in SHEPPARD, *supra* note 14, at 1143.

32. For a discussion of the Council Learned in the Law, and the alleged infamous activities of Empson and Dudley, see, e.g., R Somerville, *Henry VII's "Council Learned in the Law",* 1939 ENG. HIST. REV. 427-442.

implication in the editors' Preface to *The Golden Metwand*[33] is that the "golden metwand" is that of the *judge-made law* (not statutes, prerogative or custom) and that "the crooked cord" is the "unlawful discretion" vested in the executive[34] (not judges)—the justification for drawing this inference is that, while all tribute should certainly be paid to Sir William Wade's often ground-breaking work in administrative legal scholarship, in the late 20th and the 21st centuries administrative law has concerned itself not with the discretion exercised by judges, but with that conferred on the executive by Parliaments, as indeed the editors themselves suggest by their references to the accretions of discretionary power to the state during and after World War II.[35]

Coke himself, however, was concerned *not* with the discretion of members of the executive, but rather with the nature of the judicial discretion. Earlier in the *First Institutes*, (to which the *Golden Metwand* editors also elliptically refer)[36] analyzing Littleton on jury fact findings in relation to unwritten conditions imposed upon freehold, after which the jurors may seek guidance from the judges on the law,[37] he wrote :

> "*And prayed the discretion of the Justices.*" That is to say, They, (having declared the special matter) pray the discretion of the Justices, which is as much to say, as, That they would discerne what the Law adjudgeth thereupon, whether for the Demandant or for the Tenant: for as by the authority of Littleton, *Discretio est discernere per legem, quid sit justum*, [Discretion is to know through law that which is just] that is, to discerne by the right line of law, and not by the crooked cord of private opinion, which the vulgar call Discretion: *Si à jure discedas, vagus eris, & erunt omnia omnibus incerta*:[If you depart from the law, you will go astray, and all things will be uncertain to everybody] and therefore Commissions that authorise any to proceed, *secundum sanas discretiones vestras* [according to your sane discretions], (as in the case *de Sewers*) is as much to say, as, *Secundum Legem & consuetudinem Angliae.*[According to the law and custom of England].[38]

The editors also assert that in *Keighley's Case,*[39] Coke said that "where discretion was granted . . .it should be 'limited and bound with the rule of

33. Editors' Preface to GOLDEN METWAND, *supra* note 20, especially vi-vii.

34. *Id.* at vii ("[Sir William Wade's] achievement has. . .been to bring the Golden Metwand of the common law to bear on the Crooked Cord of discretion.")

35. *Id.* at vi.

36. *Id.* at vii.

37. CO. LITT. § 366, ff. 226a-228 ("Judges ought to judge according to the Law that riseth upon the fact, for *Ex facto jus oritur* [the law arises out of the fact]"); 2 SHEPPARD, *supra* note 14, at 725-6.

38. *Id.* at § 366 f. 227b ("Of estates Upon Condition"); *see also* 2 SHEPPARD, *supra* note 14, at 730 (Sheppard's translation in square brackets).

39. Keighley's Case, (1609) 10 CO. REP. 139a (K.B.).

reason and law'."[40] Again, however, in that case (where the Commission of Sewers was involved) what Coke actually said, referring to both judges and administrators, was:

> these words in the said Act [Act 23 Hen. 8, c. 5, empowering the Commissioners "to make and ordain laws. . .or otherwise after your own wisdoms and discretions"] *sc.* "according to your wisdoms and discretions" are to be intended and interpreted according to law and justice, for every Judge or Commissioner ought to have *duos sales, viz. salem sapientiæ, ne sit insipipidus & salem conscientiæ, ne sit diabolus*:[41] Also discretion, as it is well described, is *scire per legem quid sit justum* [to discern/seeing through law that which is just][42]

Moreover, the choice of the title draws heavily upon, and is surely influenced by, the fictitious case known as *Prohibitions del Roy*[43] where Coke is reported as saying:

> but his Majesty was not learned in the Lawes of his Realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his Subjects; they are not to be decided by naturall reason but by the artificiall reason and judgment of Law, which Law is an act which requires long study and experience, before that a man can attain to the cognizance of it; And that the Law was the Golden metwand and measure to try the Causes of the Subjects; and which protected his Majesty in safety and peace: With which the King was greatly offended, and said, that then he should be under the Law, which was Treason to affirm, as he said; To which I said, that Bracton saith, *Quod Rex non debet esse sub homine, sed sub Deo et Lege* (The king must not be under man but under God and under the law).[44]

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40. Editors' Preface to *Golden Metwand*, *supra* note 20 (citing 10 Co. Rep. 139a [author can find no reference of the kind they refer to at f. 139a or elsewhere in the case]).

41. *Keighley's Case*, 10 Co. Rep. at 139a ("a judge ought to have two salts [guides/maxims/leaven], the salt [guide/maxim/leaven]of wisdom, lest he be insipid; and the salt [guide/maxim/leaven] of conscience lest he be devilish.' [*Judex habere debet duos sales, salem sapientiae, ne sit insipidus; et salem conscientiae, ne sit diabolus.*]")

42. *Id.* at 140a.

43. Prohibitions del Roy, Mich. (1608) 12 Co. Rep. ff. 63-65. For corrected date and fictitious nature of the case, see Roland G. Usher, *James I and Sir Edward Coke*, 1903 Eng. Hist. Rev. 664-765.

44. *Prohibitions del Roy, Mich.* 12 Co. Rep. at f. 65. Bracton of course had said more than this. See Bracton, *supra* note 11, and accompanying text refers; *see also* Bracton, *supra* note 8 (going immediately on to say "*quia lex facit regem*" [because law makes the king]). One can only conclude that Coke's fragments quoted Bracton elliptically quite deliberately. The "law" which makes the king, is, it is argued, the recognition by the people and the oath of governance (or coronation oath), or, to put it another way, the common law of the monarchy, and not, as Coke was implying, law solely as made by judges.

The *Twelfth Reports* was an *ex post facto* production, published posthumously (Coke died in 1634) in 1656, the editor amalgamating, translating and adumbrating scattered papers in law French by Coke; it seems clear from contemporary evidence that this was a meeting which had never occurred in the way or when the *Twelfth Reports* assert that it did, that this was an amalgamation of disparate fragments of different meetings, that Coke did not in fact defeat the king in the matter of his prerogative, (it may not even have arisen), probably did not quote Bracton at all, did not utter the famous phrase concerning the "golden metwand," but rather "fell flat on all fower. . .beseeching his Majestie to . . .pardon him, if he thought zeale had gone beyond his dutie and allegiance."[45] Dicey thought Coke's assertions in the purported report were "unhistorical,"[46] Holdsworth thought the report was untrue,[47] and there is little doubt that things certainly did not occur as Coke's fragments might have suggested. To assert, as have some lawyers, that the "prerogative powers in the administration of justice [passed] into the hands of Her Majesty's judges"[48] by virtue of this opinion is ahistorical, places too naive a credence on Coke's self-serving fragments, and in the view of this writer is just plain wrong.[49]

It can be seen then, that it is of critical importance that legal scholars and judges be very clear about what exactly is "the common law" and what exactly is its relationship with the Constitution and "constitutionalism," and that the history surrounding the common law be rigorously investigated. It would also seem unwise to place uncritical credence in Sir Edward Coke, or to draw analogies between his seventeenth century observations and twentieth or twenty-first century situations without rigorous historiographical examination.

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45. *See* Usher, *supra* note 43, for the details and sources; the reference to Coke falling flat on all fours is from a letter, Sir Rafe Boswell to Dr Milbourne, Hatfield MS. 125, f. 36, as quoted and cited by Usher at 669.

46. A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, 18 (Macmillan and Co., London, 3d ed., 1889) (1885).

47. 2 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW, 430-431 (Methuen & Co, London, 7th ed. 1966) (1903).

48. S. DE SMITH & R. BRAZIER, CONSTITUTIONAL AND ADMINISTRATIVE LAW, 141, n. 67 (Penguin Books, London, 7th ed. 1994).

49. *See* DAVID FELDMAN, ENGLISH PUBLIC LAW, (OUP, Oxford, 2004) (giving examples of this widely accepted view); HILAIRE BARNETT, CONSTITUTIONAL AND ADMINISTRATIVE LAW, 118-119 (Routledge-Cavendish, Abingdon, 2006); IAN LOVELAND, CONSTITUTIONAL LAW, A CRITICAL INTRODUCTION, 104 (Butterworths, London, 1996); SMITH & BRAZIER, *supra* note 48, 141, n. 67. *See also* Paul Craig, *Prerogative, Precedent and Power*, in GOLDEN METWAND, *supra* note 20, 65 at 67-68 (concentrating on prerogative in the context of judicial review.); and *see also* Ivan Hare, *Separation of Powers and Error of Law*,113-139 at 130, in GOLDEN METWAND, *supra* note 20. There is therefore also reason to view The Case of Proclamations, 1611, Mich., 8 Jac 1, 12 CO. REP., f. 74, also published posthumously in Coke's Twelfth Reports, with considerable scepticism (as indeed lawyers have treated the Case of Non Obstante, 12 CO. REP., f. 18, which supported the dispensing power—see introductory note to Twelfth Reports, referring to Hargrave in 11 STATE TRIALS 30 and to Sergeant Hill, both of whom challenged the veracity of the Twelfth Reports, the latter saying that that *Obstante* was 'not fit to be allowed;' similar scepticism by Holroyd J in *Lewis* v *Walter*, 4 Barn. & Ald., 614 was also referred to).

B. *Lawyers and the "Common Law"*

The protagonists in the "common law constitutionalism debate" all conflate judge-made "common law" with "the rule of law"—the judge-made common law *is* the rule of law. In the nineteenth century, Dicey specifically equated the "rule of Law" with "the predominance of the legal spirit,"[50] and with "the supremacy throughout all our institutions of the ordinary law of the land";[51] he said:

> This rule of law, which means at bottom the right of the Courts to punish any illegal act by whomsoever committed, is of the very essence of English institutions. . . .the supremacy of the law of the land means in the last resort *the right of the judges* to control the executive government.[52]
>
> Our constitution, in short, is *a judge-made constitution*. . .[53]

This emphasis on the "rule of law" in tandem with, and for practically all writers as a necessary component of, the "common law" has in some cases been carried to extremes. For example, Allan, writing on the doctrine of parliamentary sovereignty, said: "Parliament is sovereign because *judges* acknowledge its legal and political supremacy,"[54] and others have stated "it is *the judges who are sovereign.*"[55] (Surely there is someone to make a case for *the people* as being the determining factor?) This might well seem to smack of hubris; and Craig is surely right when he says that the "rule of law" is a contested concept.[56] But the conjunction of "rule of law" with the "common law" as understood in its restrictive sense by these writers gives rise to the inference that *only* the courts can uphold the "rule of law," that *only* the courts are the bastions of protection for the individual against "arbitrary power"[57] (a phrase bandied about by administrative lawyers, but redolent of the misuse put to that phrase in the context of Whig historiography on the seventeenth century monarchical governments)[58] with the corollary that other repositories of power like the executive or the legislature do not, cannot, or may not uphold the "rule of law,"

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50. *See* Dicey, *supra* note 46, at 182.

51. *Id.* at 393.

52. *Id.* at 393-94 (emphasis added).

53. *Id.* at 184 (emphasis added).

54. T. R. S. ALLAN, LAW, LIBERTY AND JUSTICE, THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM, 10 (Clarendon Paperbacks, Oxford, 1994) (emphasis added).

55. SIR WILLIAM WADE, CONSTITUTIONAL FUNDAMENTALS, 33 (Stevens, London, revised edition 1989) (emphasis added) (quoted in GOLDSWORTHY, *supra* note 24, at 239).

56. Craig, *supra* note 15, at 585-86.

57. *Cf.* DICEY, *supra* note 46, at 176.

58. A left-over bias of the Whig historiography; the 17th century has recently been undergoing a more stringent reappraisal by scholars like Glenn Burgess. *See* GLENN BURGESS, THE POLITICS OF THE ANCIENT CONSTITUTION, AN INTRODUCTION TO ENGLISH POLITICAL THOUGHT, 1603-1642, (Pennsylvania State University Press, University Park, Philadelphia, 1993); GLENN BURGESS, ABSOLUTE MONARCHY AND THE STUART CONSTITUTION, (Yale University Press, New Haven, 1996); Glenn Burgess, *The "Historical Turn" and the Political Culture of Early Modern England: Towards a Postmodern*

that they may in fact break it, and may even possibly abuse their power, slipping into "arbitrary government." The "rule of law" has somehow mysteriously become the sole property of lawyers and judges.

In investigating these issues, two major difficulties arise. The first is the approach of legal historical scholars to the concept of the "common law." The second is the adaptation of understandings of the "common law" derived in part from such legal historical scholarship to the concept of "constitutionalism," giving rise to a theory of "common law constitutionalism" which essentially elevates the position of the judiciary in the United Kingdom and elsewhere as guardians of both legal and moral rights seen to be implicit in constitutionalism and enforced and upheld by the common law courts, and equates the "rule of law" with this judicial guardianship. Common to both of these issues is a clear understanding of the "common law" as *judge-made law*. This Article argues that this is a misapprehension, which ignores both the origins of, and the nature of, the common law, which this Article argues are to be found in the monarchical oath of governance.

This oath, it is argued, has been the underpinning of the law common to the English for over 1,200 years. The fundamental misapprehension of the nature of the common law by legal historians and modern legal constitutionalists is, it is argued, founded upon self-limiting understandings of the law by legal scholars—firstly, as to its essentially 'professionalist' nature; secondly, by ignoring the Anglo-Saxon laws and their continuity; and thirdly, by the persistence of Whig historiography amongst lawyers in marginalizing the central role of the monarchy in the commonality of the law and in constitutionalism itself.

III. THE NATURE OF "THE COMMON LAW"

A. Sir Matthew Hale

The law is organic, as Sir Matthew Hale[59] realized:

> . . .the Nature of Laws themselves in general, which being to be accommodated to the Conditions, Exigencies and Conveniencies of the People, for or by whom they are appointed, as those Exigencies and Conveniencies do insensibly grow upon the People, so many times there grows insensibly a

History? in NEO-HISTORICISM: STUDIES IN RENAISSANCE LITERATURE, HISTORY AND POLITICS, 29-47 (ROBIN HEADLAM WELLS ET AL. EDS., 2000); *see also* the Introduction by the editors to that book.

59. SIR MATTHEW HALE, 1 November 1609-25 December 1676, educated Magdalen College Oxford, admitted Lincoln's Inn (1628), barrister 1637, counsel for amongst others, a *Ship-Money* judge and Archbishop Laud, Justice of Common Pleas under Oliver Cromwell (1654), sat in Oliver Cromwell's Lower House (1654) and that of Richard Cromwell (1659) and in the parliament of 1660, Chief Baron of the Exchequer under Charles II (1660) and Chief Justice of King's Bench (1671), resigning in 1676; author of posthumously published HISTORY OF THE COMMON LAW (1713), HISTORY OF THE PLEAS OF THE CROWN (1736) JURISDICTION OF THE LORD'S HOUSE (1796) PREROGATIVA REGIS (1976). BIOGRAPHICAL DICTIONARY OF THE COMMON LAW, (A. W. B. SIMPSON ed., Butterworths, London, 1984); ALAN CROMARTIE, SIR MATTHEW HALE 1609-1676 : LAW, RELIGION AND NATURAL PHILOSOPHY, (Cambridge University Press, Cambridge, 2003) (1995).

> Variation of Laws, especially in a long tract of Time; and hence it is, that tho' for the Purpose in some particular Part of the Common Law of England, we may easily say, That is the Common Law, as it is now taken, is otherwise than it was in that particular Part or Point in the Time of *Hen.* II when *Glanville* wrote, . . . But tho' those particular Variations and Accessions have happened in the Laws, yet they being only partial and successive, we may with just Reason say, They are the same *English* Laws now, that they were 600 Years since in the general. . . .as Titius is the same Man he was 40 Years since, tho' Physitians tell us, that in a Tract of 7 Years, the Body has scarce any of the same Material Substance it had before.[60]

In earlier centuries, scholars investigating the common law tended to see its origins in the days of the Anglo-Saxon period. While much of the research and thinking concerning the Anglo-Saxon laws was subverted into polemic for political purposes in the seventeenth century under the rubrics of "the ancient constitution"[61] or "the antiquity of the House of Commons,"[62] (matters not investigated here) nevertheless writers were well aware of the impact of Anglo-Saxon laws. Hale himself had clearly stated that the common law consisted not only in the *leges non scriptæ*, but also in "Parliamentary Acts or Constitutions, made in writing by the King, Lords and Commons. . .made before the Time of Memory;"[63] among which he included those "as were made before the coming in of King *William* I, commonly called, *The Conqueror*,"[64] but particularly those collected by William Lambard in the sixteenth century—that is, the laws of "*Ine, Alfred,*

60. SIR MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND, 39-40 (Charles M. Gray ed., Univ. of Chicago Press 1971).

61. For discussion, see the works of GLENN BURGESS, *supra* note 58; JANELLE GREENBERG, THE RADICAL FACE OF THE ANCIENT CONSTITUTION: ST EDWARD'S "LAWS" IN EARLY MODERN POLITICAL THOUGHT, (Cambridge University Press 2001); J. G. A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW, (Cambridge University Press 2d ed. 1987) (1957); J. G. A. POCOCK, The Machiavellian Moment, (Princeton Univ. Press 2d ed. 2003); H. BUTTERFIELD, THE ENGLISHMAN AND HIS HISTORY, (Cambridge Univ. Press 1944), and H. BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY, (G. Bell and Sons 1963) (1931); H. NENNER, BY COLOUR OF LAW, (Univ. of Chicago Press 1977); C. C. Weston, *England : Ancient constitution and common law*, *in* THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 1450-1700, 374, 374-411 (J. H. BURNS and MARK GOLDIE eds., (Cambridge Univ. Press 1991).

62. WILLIAM PETYT, THE ANTIENT RIGHT OF THE HOUSE OF COMMONS ASSERTED, OR A DISCOURSE PROVING BY RECORDS AND THE BEST HISTORIANS, THAT THE COMMONS OF ENGLAND WERE EVER AN ESSENTIAL PART OF PARLIAMENT, (1680); SIR ROBERT ATKYNS, THE POWER, JURISDICTION, AND PRIVILEDGE OF PARLIAMENT; AND THE ANTIQUITY OF THE HOUSE OF COMMONS ASSERTED (1689). Both Petyt and Atkins were among the judges of whom the Lords sought advice as to the existence of "the original contract" in early 1689. *See* C. C. WESTON & J. R. GREENBERG, SUBJECTS AND SOVEREIGNS: THE GRAND CONTROVERSY OVER LEGAL SOVEREIGNTY IN STUART ENGLAND, 249, 255-256. (Cambridge Univ. Press 1981).

63. HALE, *supra* note 60, at 2-3 (noting that "time before memory" was set as "the Beginning of the Reign of King Richard I, or *Ex prime coronatione Regie Richardi primi.*")

64. HALE, *supra* note 60at 4 (italics in original).

Athelstane, Edmond, Edgar, Ethelred, Canutus, and of *Edward the Confessor*."[65]

Hale, himself a judge, saw the common law, in its "proper and usual Acceptation" as being "that Law by which Proceedings and Determinations in the King's *Ordinary Courts* of Justice are directed and guided."[66] Clearly for him, the common law was that which *guided* the judges, not that which was *made* by the judges. He made clear his understanding of the common law when he stated the "formal constituents" of the common law being *three*: usage and custom; Acts of Parliament; and judicial decisions.[67] Of the latter he says:

> . . .Decisions of Courts of Justice, tho' by Vertue of the Law of this Realm they do bind, as a Law between the Parties thereto, as to a particular Case in Question till revers'd by Error or Attaint, yet they do not make a Law properly so called, (for that only the King and Parliament can do); yet they have great Weight and Authority in Expounding, Declaring and Publishing, what the Law of this Kingdom is, especially when such decisions hold a Consonancy and Congruity with Resolutions and Decisions of former Times; and tho' such Decisions are less than a Law, yet they are a greater Evidence thereof, than the Opinion of private Persons, as such, whatsoever.[68]

There are four reasons Hale gives for weight to be given to judicial decisions—people chosen as judges have greater knowledge of the laws than others; such people "are upon their Oaths to judge according to the Laws of the Kingdom;" they have the "best Helps to inform their Judgments;" and they do so "*Sedere pro Tribunali*, and their Judgments are strengthen'd and upheld by the Laws of this Kingdom, till they are by the same law revers'd or avoided."[69] It is clear that, for Hale, judicial decisions in the ordinary courts were not the sum of the common law. In addition to customs and statutes, it included the *Lex Prerogativa*.[70] Hale remarks:

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65. HALE, *supra* note 60, at 5 (citing WILLIAM LAMBARD esq., TRACTATUS DE PRISCIS ANGLORUM LEGIBUS; this text is known as the ARCHION by WILLIAM LAMBARDE of 1592); *see also* reference in PATRICK WORMALD, The Making of English Law: King Alfred to the Twelfth Century, 6-7, n. 19 (Blackwell Publishers, 2001) (1990); *see also* his reference to the original source, ARCHAIONOMIA, at 493; *And see* the reference to WILLIAM LAMBARDE, ARCHEION, CHARLES H. MCILWAIN and PAUL L WARD (eds.), (Cambridge Mass., 1957), in WESTON & GREENBERG, SUBJECTS AND SOVEREIGNS, *supra* note 62, at 10.

66. HALE, *supra* note 60, at 25 (italics in original); *cf.* DICEY, *supra* note 46, at 175, 181, 190 ("ordinary courts," "ordinary tribunals" and "ordinary Courts," "the ordinary law of the land administered by the ordinary Law courts," and "thus the constitution is the result of the ordinary law of the land").

67. HALE, *supra* note 60, at 68.

68. HALE, *supra* note 60, at 68.

69. HALE, *supra* note 60, at 68-69.

70. HALE, *supra* note 60, at 26.

> (*Chapter III Concerning the Common Law of England*)—The common Municipal Law of this kingdom. . . is the common Rule for the Administration of common Justice in this great Kingdom;. . .[71] . . .This [common] Law is that which asserts, maintains, and. . . provides for the Safety of the King's Royal Person, his Crown and Dignity, and all his just Rights, Revenues, Powers, Prerogatives and Government, as the great Foundation (under God) of the Peace, Happiness, Honour and Justice, of this Kingdom; and this Law is also, that which declares and asserts the Rights and Liberties, and the Properties of the Subject; and is the just, known, and *common Rule of Justice and Right between Man and Man*, within this Kingdom.[72]

For Hale, then, the common law is "the *common* Municipal Law or *rule of justice* in this Kingdom"[73] and "that law which is common to the generality of all Persons, things and Causes, and has a Superintendency over those particular Laws which are admitted in relation to particular Places or Matters."[74]

B. Sir Edward Coke

Sir Edward Coke[75] typically gave many different interpretations of "the law", saying variously it consisted in fifteen[76] or sometimes three different types of law: in his *First Institutes* drawing on Littleton he mentioned

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71. HALE, *supra* note 60, at 45.

72. HALE, *supra* note 60, at 46 (emphasis added).

73. HALE, *supra* note 60, at 56 (emphasis added).

74. HALE, *supra* note 60, at 57.

75. SIR EDWARD COKE, 1 February 1552-3 September 1634, educated Trinity College Cambridge, admitted Clifford's Inn (Chancery, 1571) and to the Inner Temple (1572), barrister 1578, Speaker of the House of Commons (1593), Solicitor-General (1592-94) and Attorney-General (1594-1603) under Elizabeth I, prosecutor on behalf of the Queen in Star Chamber [e.g., 4 February 1597, Hawarde, *Cases in Camera Stella* at 32-33] of the Earl of Essex [1601] and Sir Walter Ralegh [(1603) 2 *State Trials*, 1] for treason, and Attorney-General under James I (1603-1606), knighted by James I (coronation knighthood, 1603), Chief Justice of Common Pleas (1606) and Chief Justice of King's Bench (1613-1616) under James I, Privy Counsellor 1617-1622, Lord Commissioner of the Treasury 1620, elected member for Liskeard in the House of Commons 1620, re-elected 1624, elected again, member for Norfolk 1626, and again in 1628 as member for Buckinghamshire and Suffolk, but does not sit after finalization of Petition of Right later in 1628; author of THE REPORTS (CO. REP.), Twelve Volumes, 1600-1659, and THE INSTITUTES OF THE LAWS OF ENGLAND (CO. LITT.= 1 CO. INST.), (4 Vols.), 1628-1640—*see* SHEPPARD, SELECTED WRITINGS . . . *supra* note 14, Vol. 1; *and see also* A. W. B. SIMPSON, BIOGRAPHICAL DICTIONARY, *supra* note 59; *see also* ALLEN D. BOYER, SIR EDWARD COKE AND THE ELIZABETHAN AGE, (Stanford University Press 2003); SAMUEL E. THORNE, SIR EDWARD COKE 1552-1952, Selden Society Lecture, 15 March 1952, Lincoln's Inn, (Bernard Quaritch 1957).

76. CO. LITT., ff. 11a-11b, l.1, c. 1, § 3 ("*lex Coronæ*; *Lex & consuetudo Parliamenti*; *Lex naturæ*; *Lex communis Angliæ*; Statute Law; *Consuetudines*; *Jus belli, in republica maxime conservanda sunt jura belli*; Ecclesiastical, or Canon law in Courts in certain cases; Civil law in certain cases, not only in the Courts Ecclesiastical, but in the Courts of the Constable, and Marshall, and of the Admiralty; *Lex Forestæ*; The Law of Marque or Reprisal; *Lex Mercatoria*; The Laws and Customs of the Isles of Jersey, Gernsey, and Man; The Law and priviledge of the Stannery; The Laws of the east, west, and Middle Marches, which are now abrogated.")

the "Law Temporal", the "Law Spiritual" and the "Ordinary" (in ecclesiastical cases);[77] earlier he had said, under the heading "common law":

> The Law of England in divided, as hath beene said before, into three parts, the Common Law, which is the most generall and ancient Law of the Realms; . . . ; 2. Statutes or Acts of Parliament; and 3. Particular Customes . . . I say particular, for if it be the generall Custome of the Realme, it is part of the Common Law.
>
> The Common Law hath no controller in any part of it, but the high Court of Parliament, and if it be not abrogated or altered by Parliament, The Common Law appeareth in the Statute of Magna Charta and other ancient Statutes (which for the most part are affirmations of the Common Law) in the originall writs, in judiciall Records, and in our bookes of termes and yeers.[78]

However, Coke would probably have agreed with Hale's tripartite description of the common law,[79] and on its including the royal prerogative,[80] Coke admitting that in times "to prevent dangers, which it will be too late to prevent afterwards" the king may prohibit them before the offence by the "grand prerogative" of proclamation.[81] He would also agree that the common law was founded on the doing of justice and right; speaking of clause 29 of Magna Carta, he said:

> 11. *Justitiam vel rectum* [Justice or Right.]
>
> Wee shall not sell deny, or delay Justice and right. *Justitiam vel rectum*, neither the end, which is Justice, nor the meane, whereby we may attaine to the end, and that is the law. *Rectum*, right, is taken here for law, in the same sense that *jus*, often is so called. 1. Because it is the right line,

77. CO. LITT., L. 3, c. 3, Section 648, f. 344a. Coke's discussion arises from Littleton's words "Patron according to the Law Temporal, and the Ordinarie according to the law spirituall . . . ." He says that Law Temporal consists in the common law as evinced in books of law and judicial records, statutes and customs; Law spiritual consists in ecclesiastical laws "allowed by the lawes of this realme *viz.*, which are not against the common law (whereof the king's prerogative is the principall part) nor against the statutes and customs of the realme:. . ." "Ordinary" he describes as "*Ordinarius*, he that hath ordinarie jurisdiction in causes ecclesiasticall, immediate to the king and his courts of common law, for the better execution of justice. . . ."

78. CO. LITT., L.2, c. 10, Section 170, f. 115b; SHEPPARD, *supra* note 14, 2:711. C.f. also CO. LITT., f. 110b as to custom, and f. 344a. *Cf. The Case of Proclamations* 12 CO. REP. at 76 ("The law of England is divided into three parts: common law, statute law, and custom. . .")

79. *See supra*, text accompanying note 67.

80. *See supra*, text accompanying notes 70-72.

81. *The Case of Proclamations*, 12 CO. REP. at 75. It should be noted that the argument in *The Case of Proclamations* is far from consistent, and is likely to suffer from the same defects as *Prohibitions del Roy*, discussed *supra* in the text accompanying notes 43-49. *See also* Caudrey's case, *infra* note 83. *Note also* Darnel's case (The Five Knights' Case), 1627, 3 Car. I, 3 STATE TRIALS, 1, 193 ("prerogative is part of the law. . .").

> whereby Justice distributative is guided, and directed, and therefore all the Commissions of *Oier*, and *Terminer*, of goale delivery, of the peace &c. have this clause, *Facturi quod ad justitiam pertinet, secundum legem*, and *consuetudinem Angliae*, [to do what belongs to justice according to the law (and) custom of England] **that is, to doe Justice and Right, according to the rule of the law and custome of England; and that which is called common right** in 2. Edw. 3. is called Common law, in 14. Edw. 3. &c. in this sense it is taken, where it is said, *ita quod stet recto in curia, i. legi in curia.*[so that he stand to right in court, that is, to the law in court.] The law is called *rectum* [right] because it discovereth, that which is tort, crooked, or wrong, for as right signifieth law, so tort, crooked or wrong, signifieth injurie, and *injuria est contra jus* [c.f. *Injuria est in, seu contra jus*] against right: *recta linea est index sui, & obliqui,* [a straight line is a guide to itself and to the crooked] hereby the crooked cord of that, which is called discretion, appeareth to be unlawfull, unlesse you take it, as it ought to be, *Discretio est discernere per legem, quid sit justum.* [Discretion is to discern by law what is just] 3. It is called Right, because it is the best birth-right the Subject hath, for thereby his goods, lands, wife, children, his body, life, honor, and estimation are protected from injury, and wrong: *major haereditas venit unicuiq; nostrum à jure, & legibus, quam à parentibus.*[a greater inheritance comes to each of us from the law and statutes than from our parents (Cicero}].[82]

For Coke, then, it could be said that the "common law" was equivalent to the "common right" and that both were described by the doing of "justice and right."

However Coke's attitude towards what he considered to be the common law depended on his personal circumstances and position. He supported the prerogative over the any other sort of law when he was Speaker of Elizabeth's Commons, Solicitor-General and Attorney-General.[83] But once he left the Attorney-ship to become Chief Justice of Common Pleas, his view changed—he elevated the common law (that is, as used by the judges) over the both the prerogative[84] and over Acts of Parliament.[85] But

82. 2 CO. INST., c, 29, f. 56, *reprinted in* 2 SHEPPARD, *supra* note 14, at 872 (emphasis added).

83. Caudrey's case, Of the King's Ecclesiastical Jurisdiction, *Casus Caudreii, De Jure Regis Ecclesiastico*, Hil., 33 Eliz., ROTULO 340, 5 CO. REP., 1a-41b.

84. *Case of Proclamations*, 1611, *supra* note 81, at 76 ("the King's proclamation is none of [common law, statute, or custom]" but, Coke there also says "the King hath no prerogative, but that which the law of the land allows him.") I would argue that the law of the land gave the king extensive prerogative through the oath of governance, and indeed the king's prerogative was specifically mentioned in the Stuart oath of governance. Note also my reservations about the reliability of this so-called Twelfth Report, *supra* in notes 49 and 81.

after his removal from King's Bench in 1616 and his re-appointment as a Privy Counsellor in 1617, he sat in Star Chamber and was responsible for the imposition of enormous fines, often upon personal enemies.[86] But this reacquaintance with the prerogative was fleeting, and, unsurprisingly in such a man, his view changed yet again when he was became a member of James' House of Commons;[87] as a member of the House of Commons, he elevated Acts of Parliament over both prerogative and common law as made by judges—he resiled from the findings of the judges in *The Five Knights' case*,[88] leading to the Petition of Right and the development of the concept of "sovereignty" of Parliament.[89] For Coke, "[r]eason is the life of the law, nay, the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long studyFalse"[90] But for Coke, the role of the common law was a moveable feast, from which he supped differently depending on which position he held.

But by the time that great man Maitland wrote at the end of the nineteenth century, lawyers, following Coke's lead when he was a judge, had seized and appropriated the term "common law" to themselves; this led Maitland to enunciate his own tripartite definition which, however, held internal inconsistencies:

- It was the "common law" because it was "common" in the sense of being "general" and as opposed to "special" law, (and thus did not include equity);[91] it was "common

85. Dr Bonham's case, 1609, Mich., 6 Jac. 1, 8 Co. REP., 107a ("for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void"); *see also* Bonham v Atkins and Others, Hil., 1610, 7 Jac. 1, 8 Co. REP., 114a, f. 118a.

86. Thomas G. Barnes, *Introduction to Coke's "Commentary on Littleton"*, *in* LAW, LIBERTY AND PARLIAMENT : SELECTED ESSAYS ON THE WRITINGS OF SIR EDWARD COKE, 1, 16 (ALLEN D. BOYER ed., (Liberty Fund 2004).

87. *See supra* note 75, for details for Coke's career.

88. The Five Knights' Case (Darnel's case), 1627, 3 Car. I, 3 STATE TRIALS 1.

89. *see id.* at 81-82 (comparing his career as a judge, and his then current one as a member of the House of Commons, Coke said, "I have now better guides, Acts of Parliament."); *see also* COMMONS DEBATES, 1628, II, 213, Proceedings and Debates, ff. 36v-37.

90. 1 Co. INST., 97 b.

91. Of course equity, or the making of judgments with justice, mercy, and truth, was part of the restriction on the power to make judgments as set down in the oath of governance; on occasion this had been made explicit:—*see* the Anglo-Saxon oath, (text *infra* at Part VII, Annex, A-B, and discussed *infra* in text accompanying notes 97-111 and 171-188), which was taken also by William I, *see infra* Part V, C *William I and Continuity of the Laws*; *see also* BRACTON, *supra* note 5, at 304, f.107 for Henry III; *and see* the text of an oath of governance examined as amended by Henry VIII, in LEOPOLD G. WICKHAM LEGG, ENGLISH CORONATION RECORDS, 240 (Archibald Constable & Co. Ltd. 1901) ("And he shall do in his iudgementes equytee and right justice wt discression and mercye"); *cf.* LITTLE DEVICE for Richard III and Henry VII (on some occasions, the notion of "equity" was rendered thus: "You shall make to be doon after your strengith and powoyr egall and rightfull justice in all your doomys and judgments and discretion with mercy and troueth") By 1603, these sentiments were rendered thus for James VI and I, (and Charles I and II, and James II and VII)—"Will you to your power cause law, justice and discretion in mercy and truth to be executed in all your judgments?" Today, the idea of justice, equity, mercy and truth in judgment is rendered thus—"Will you to your power cause Law and Justice, in Mercy, to be executed in all your judgments?" [Elizabeth II, *see infra* text in Part VI, Annex, F.]

to the whole land," and "is to be distinguished from local customs"[92]

- It was unenacted law, as distinguished from statutes and ordinances[93]
- It was the law of the temporal courts, as distinguished from ecclesiasticallaw[94]

With the greatest respect to Maitland, this definition is deficient, grounded not in history but in nineteenth century preoccupations, and owes much to a profession-oriented approach to the law.

C. *The definition of "common law"*

How then can one describe the "common law"? Drawing upon the evolution of the law in England, and having regard to the thinking of lawyers like Hale and Coke, it seems that the common law can best be described as that law common throughout the kingdom and which is "the common rule of justice and right between man and man."[95] What is significant about this definition is that it does not concentrate on that familiar rubric, "the rule of *law*," but rather "the common rule of *justice and right*,"[96] a formulation which goes far beyond the connotations of the former expression, which has tended to become the property of lawyers.

What is even more significant is that this idea of the common law as justice and right derives directly from the oath of governance. The Anglo-Saxon-Norman oath required the monarch to "preserve true peace at all times," to "forbid rapacity and all iniquities to all degrees," and in "all judgements [to] enjoin equity and mercy."[97] The fourteenth century oath required the monarch to grant, confirm, and keep the laws and custom of his predecessors and particularly those of Edward the Confessor (an addition to the Anglo-Saxon oath probably introduced by Henry III), to keep the peace, to cause law, justice and discretion, in mercy and truth, to be executed in all [his] judgements, and to uphold, keep, and defend "the laws and rightful customs, which the commonalty of this your Kingdom have." By the time of James VI and I, the oath replicated all the provisions of the fourteenth century oath, but with changes to the first vow regarding maintenance of the laws and customs;[98] James swore in the affirmative to:

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92. F. W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND, A SERIES OF LECTURES GIVEN IN CAMBRIDGE FROM 1887-1888, 22 (Cambridge Univ. Press, 1950) (1908). As to equity, *see id.* at 225-226, 466-471; the distinction between Courts was largely erased by the Judicature Acts UK (1873), c. 66; (1875), c. 77; (1876), c. 59); *see* T. F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW, 211-212 (Little, Brown and Company, 5th ed., 1956).

93. MAITLAND, *supra* note 92, at 22.

94. MAITLAND, *supra* note 92, at 22.

95. HALE, *supra* note 60.

96. *Accord* HALE, *supra* note 60; COKE, Caudrey's case, *supra* note 83.

97. *See infra* at Part VII, Annex, A-B.

98. *See infra* at Part VII, Annex, at D.

> grant and keep and by your oath confirm to your people of England the laws and customs to them granted by the kings of England your lawful and religious predecessors; and namely the laws, customs and franchises granted to the clergy and to the people by the glorious king, St Edward, your predecessor, according and conformable to the laws of God and true profession of the gospel established in this kingdom, and agreeing to the prerogatives of the kings thereof and to the ancient customs of this realm?[99]

The addition of references to the laws of God and the true profession of the gospel had been added after the English reformation; the reference to the acceptability of laws and custom to the prerogative was probably added by Henry VIII. The specific reference to "this kingdom" was necessary as the Stuarts were also kings of Scotland, and were required to take a different oath for that realm.[100] The revolution of 1688-89 saw the oath changed again: in an oath drafted by the commons,[101] the monarchs in their English oath swore to:

- govern the people of the kingdom of England and the Dominions thereto belonging according to the statutes in parliament agreed on and the laws and customs of the same
- cause law and justice in mercy to be executed in all judgements.
- maintain the laws of God, the true profession of the gospel and the protestant reformed religion established by law [in England] and preserve unto the bishops and clergy of this realm [England] and to the churches there committed to their charge all such rights and priviledges as by law do or shall appertain unto them or any of them.

This is substantially the same oath sworn by Elizabeth II,[102] the major difference being that "United Kingdom of Great Britain and Northern Ireland" has been substituted for "England," the independent nation states have been added to the first clause, and the establishment of the "reformed religion established by law" has been specifically confined to England. Thus, all power necessary and sufficient to govern has been conferred by this binding of monarch to people in the oath. In essence, this is the basis

99. *JURAMENTUM REGIS JACOBI*, 1603, from the Tanner manuscript, in the Bodleian Library (Tanner MSS. [Bodl.], vol. 94, f. 121, in SELECT STATUTES AND OTHER CONSTITUTIONAL DOCUMENTS ILLUSTRATIVE OF THE REIGNS OF ELIZABETH AND JAMES I, 391 (G. W. PROTHERO ed., Clarendon Press, 4th ed. 1963) (1894).

100. See KELLY, KING AND CROWN, *supra* note 3, for a complete discussion of the oaths of governance.

101. Coronation Oath Act, 1688, 13 W. & M. 3, 2, c. 6, (England).

102. *See infra* Part VII, Annex, F for text.

of the common law, which includes statutes, customs, judgements, and also the laws of God.

Of course, as we shall see, since Alfred the laws of God had been fundamental to English laws,[103] and at least since Cnut[104] the law had been common in the sense of being general and common to the whole land[105] and was applied to rich and poor alike[106] and to all inhabitants independent of race or position[107] and consisted not just of any judgments or dooms made by those judging on behalf of the king, but also all edicts and written laws;[108] and from the time of Alfred[109] written laws had been collected into a *domboc* (book of dooms/judgments, edicts) or code, and judges required to know both the written and unwritten law.[110] The relationship between

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103. LAWS OF ALFRED THE GREAT, discussed *infra* in text accompanying notes 171-182.

104. Cnut, king of England, 1016-1035; king also of Denmark, and Norway.

105. II Cnut (secular laws) Prologue, 161 ("and I will that it [the secular law] be observed over all England [*eall Englaland*]") cited in B. THORPE, ANCIENT LAWS AND INSTITUTES OF ENGLAND, (The Lawbook Exchange 2003) (1840).

106. *E.g.,* II Cnut, c. 1, cited in THORPE, ANCIENT LAWS, *supra* note 105, at 161 ("That is then the first that I will: that just [*rihte*] laws be established, and every unjust law [*unlage* "unlaw"] be carefully suppressed, and that every injustice [*unrihte*] be weeded out and rooted up, with all possible diligence, from this country. And let God's justice [*riht*] be exalted; and henceforth let every man, both poor and rich, be esteemed worthy of the folkright, [*folcrihtes*] and let just dooms [*rihte domas*] be doomed to him").

107. Cnut, 1020—"If any be so bold, clerk or lay, Dane or English, as to go against God's laws and against my royal authority, or against secular law, and be unwilling to make amends, and to alter according to my bishop's teaching, then I pray Thurcyl my earl, and also command him, that he bend that unrighteous one to right if he can; if he cannot, then will I with the strength of us both that he destroy him in the land or drive him out of the land, be he better, be he worse. . ." This has been described as a writ, or as a "letter proclamation" or Cnut's "first letter to the English," manifested after Cnut's Oxford code of 1018, but before his Winchester Code. *See* WORMALD, *supra* note 65, at Table 3.1, 111, 196, 346-48, 319; *see* the translation in WILLIAM STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY, 90-92, 91 (H. W. C. DAVIS, ed., Clarendon Press, 9th ed. 1962) (1870).

108. Cnut 1020—"and I will that all people, clerk and lay, hold fast Edgar's [king 959-975] law. . ."—STUBBS, SELECT CHARTERS, *id.* at 91, and *see infra* note 195 and accompanying text. *Also see* 1 Edward, (king c.899-925) Preamble: *Eadwerd cyning byt ðam gerefum eallum, ðæt ge deman swa rihte domas swa rihtoste cunnon, 7 hit on ðære dombec stande. Ne wandiað for nanum ðingum folcriht to geregceanne; 7 ðæt gehwile spræce habbe andagan, hwænne heo gelæst sy, þæt ge ðonne gereccan'* [Edward king, commands all reeves: that you give in judgment such right/just judgment as you know to be the most right/just, and that are in the domboc [book of law/written law.] Nor shall you for any reason/thing fail to explain/relate/take account of the folcright; and that at the same time it is your duty to have a date fixed for every decision in a case.] *See* F. L. ATTENBOROUGH, THE LAWS OF THE EARLIEST ENGLISH KINGS, 114 (Cambridge University Press, 2000) (1922).

109. Alfred the Great, (king 871-899), date of *domboc* c. 895, *see* WORMALD, MAKING OF ENGLISH LAW, *supra* note 65, Table 3.1.

110. LAWS OF ALFRED, Introduction, c. 49, § 9 [*Ic ða Ælfred cyning þás togædere gegaderode, 7 awritan het monege þara þe ure foregengan heolden. ða ðe me licodon; 7 manege þara þe me ne licodon ic áwearp mid minra witena geðeahte, 7 on oðre wisan bebead to healdanne. Forðam, ic ne dorste geðrislæcan þara minra awuht fela on gewrit settan, forðam me was uncuð, hwæt þæm lician wolde, ðe æfter ús wæren. Ac ða ð e ic gemette awðer oðde on Ines dæge, mines mæges, oðde on Offan Mercan cyninges oðde on Æþelbtyhtes, þe ærest fulluhte onfeng on Angelcynne, þa ðe me ryhtoste ðuhton, ic þa heron gegaderode, 7 þa oðre forlét. Ic ða Ælfred Westseaxna cyning eallum minnum witum, þ as geeowde, 7 hie ða cwædon, þæt him þæt licode eallum to healdanne.*]—{I then, Alfred, king, have gathered together these [*dooms*] and ordered that many of them which our forefathers upheld which were pleasing to me be written down, and those which were not pleasing to me I, with the advice of my *witan*, rejected and in other wise ordered them to be observed. For I durst not venture to set down in writing much of my own, for it was unclear to me which of them would please those who should come

the nature of both dooms, edicts, and laws and the Anglo-Saxon (and subsequent monarchical) oath of governance is too striking to be dismissed. The continuity of those Anglo-Saxon laws and the basis of the administration of justice and government was secured under William I.[111]

IV. "LEGAL" AND "CONSTITUTIONAL" HISTORY

A. The effect of the "professional" mindset

One of the issues underlying the difficulty associated with concepts of the "common law" is that there would appear to be a disjunction between "legal history" and "constitutional history." Many lawyers engaged in legal history have tended to concentrate upon manifestations of the common law, or upon the practitioners of the common law, or both. In this sense, much legal history concerning the common law has concentrated upon the developments of certain kinds of writs or actions,[112] and has tended to concentrate upon what might be called 'private law,'[113] particularly with regard to cases involving property.[114] For example, Milsom states:

> The classical common law, like the Roman, was a system of private law resting upon an idea of private property: it was about relationships between legal equals whose rights were protected by government but were not thought of as dependant upon it.[115]

In one sense, this may be a result of the distinction made by Professor Ibbetson between "internal legal history" whose sources are "those thrown up by the legal process"[116] as opposed to "external legal history" which he

after us. But those [*dooms*] which I met with/knew whether from the days of Ine, my kinsman, or of Offa King of the Mercians, or of Æþelberht, the first of the English race to receive baptism, which seemed to me to be most just (*ryhtoste*), those I have gathered here together and the rejected the others. I then, Alfred, king of the west-Saxons, have shown these [*dooms*]/this collection to all my *witan* and they all declared that it was pleasing to them all that they should be observed/held. (my translation)}. *See also* ASSER, §106, in ASSER'S LIFE OF KING ALFRED THE GREAT AND OTHER CONTEMPORARY SOURCES, 109-110 (S. KEYNES & M. LAPIDGE, eds. Penguin, London, 1983); *See also* WORMALD, *supra* note 65, at 118-125.

111. He took the Anglo-Saxon oath of governance, and undertook to maintain the laws of his predecessors. *See* 2 THE CHRONICLE OF JOHN OF WORCESTER 607 (R. R. DARLINGTON AND P. MCGURK eds., P. MCGURK, trans., Clarendon Press, 1995, 2004 reprint) (discussing 1066 entry). For continuing the laws of his predecessors, see WORMALD, MAKING OF ENGLISH LAW, *supra* note 65, Table 3.1 and 398-99 (discussing William I, LONDON CHARTER of 1066); FACSIMILES OF ENGLISH ROYAL WRITS TO A.D. 1100, PRESENTED TO V. H. GALBRAITH (T. A. M. BISHOP and P. CHAPLAIS, eds., Oxford Univ. Press, 1957); THE ANGLO-SAXONS 237-39, 244 (JAMES CAMPBELL *et al.*, eds., Penguin Books, 1991) (discussing maintainance of Anglo-Saxon administration).

112. *E.g.* S. F. C. MILSOM, STUDIES IN THE HISTORY OF THE COMMON LAW (Hambledon Press, 1985) (especially Part I, 'On the Medieval Personal Actions.'). *See also* J. H. BAKER and S. F. C. MILSOM, SOURCES OF ENGLISH LEGAL HISTORY : PRIVATE LAW TO 1750 (Butterworths, 1986); D. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS (Oxford Univ. Press, 2001).

113. *E.g.* BAKER & MILSOM, *supra* note 112.

114. *E.g.* BAKER & MILSOM, *supra* note 112, xi.

115. *See* BAKER & MILSOM, *supra* note 112.

116. David Ibbetson, *What is Legal History a History of?* in LAW AND HISTORY, 33-40, 34 (ANDREW LEWIS & MICHAEL LOBBAN eds. Oxford Univ. Press 2004).

sees as "the history of law as embedded in its context" whose sources are *not* "those thrown up by the legal process; nor commonly is its focus the law."[117] It has been noted that "many [legal historical] scholars are less concerned with the purely institutional (and certainly with the constitutional) and more interested in the economic and social components of law."[118]

In turn, much recent legal history appears to operate upon the basis of a tendency to think that the common law could not exist (or have existed) without a professional class of lawyers—Paul Brand has asserted in *The Making of the Common Law*,[119] in relation to *Glanvill*,[120] ("the first common law treatise"[121] written 1187-89)[122] that "[n]o such treatise could have been written at the beginning of Henry [II's] reign, . . .for the Common Law itself did not then exist."[123] Here, for example, much recent work analyzes the relationship of lawyers as a profession with the law and its shape and content,[124] particularly the development of a "new" or "third university" in the inns of court and Chancery.[125] To some extent this may, consciously or subconsciously, mirror the understanding of Max Weber,[126] who in studying the historical and social development of capitalism, devised a number of typologies for legal systems, the ideal of which was one of "logically formal rationality"[127] which in turn gives rise to "legalism" or "legal domination." But fundamental to Weber's analysis of the rise of "legalism," or a rationally based autonomous rule system, was the rise of a

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117. *See* Ibbetson, *supra* note 116, at 33.

118. Janet Senderowitz Loengard, *Beyond Maitland: The Maturing of a Discipline*, 34 J. BRIT. STUD. 529-536, 530 (1995).

119. PAUL BRAND, THE MAKING OF THE COMMON LAW, (Hambledon Press, 1992).

120. *TRACTATUS DE LEGIBUS ET CONSUETUDINIBUS REGNI ANGLIE QUI GLANVILLA VOCATUR*, THE TREATISE OF THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND, COMMONLY CALLED GLANVILL, G. D. G. HALL (ed. and trans.), (Nelson, in association with the Selden Society, London, 1968). Rannulf de Glanvill's authorship of the treatise and Maitland's original suggestion that he was probably not the author, have been discussed and, I believe, disproved by Josiah Cox Russell in *Ranulf de Glanville*, SPECULUM, XLV, 68-79 (1970).

121. BRAND, *Introduction*, in MAKING OF THE COMMON LAW, *supra* note 119, x.

122. HALL, *Introduction* to GLANVILL, *supra* note 120, xxxi.

123. BRAND, *supra* note 119, x.

124. *See*, e.g., J. H. BAKER, THE LEGAL PROFESSION AND THE COMMON LAW, (Hambledon Press, London, 1986); J. H. BAKER, THE COMMON LAW TRADITION : LAWYERS, BOOKS AND THE LAW, (Hambledon Press, London, 2000); Paul Brand, *The Origins of the English Legal Profession*, and Multis Vigiliis Excogitatam et Inventam: *Henry II and the Creation of the English Common Law*, 1-20 and 77-102 respectively in BRAND, MAKING OF THE COMMON LAW, *supra* note 119; *and see* PAUL BRAND, THE ORIGINS OF THE ENGLISH LEGAL PROFESSION, (Blackwell, Oxford, 1992). *See also* MICHAEL LOBBAN, THE COMMON LAW AND ENGLISH JURISPRUDENCE 1760-1850, (Clarendon Press, Oxford, 1991, 2001).

125. Originally for this idea *see* SIR CHARLES OGILVIE, THE KING'S GOVERNMENT AND THE COMMON LAW 1471-1641, (Basil Blackwell, Oxford, 1958), 19; *and see also* J. H. Baker, *The Third University of England*,(1990), in BAKER, THE COMMON LAW TRADITION, *supra* note 124, 3-28.

126. C.f. David Trubek's observation in his *Max Weber on Law and the Rise of Capitalism*, 1972 WIS L REV, 720-753, 721. All this paragraph referring to Weber is heavily indebted to Trubek.

127. MAX WEBER, 2 ECONOMY AND SOCIETY, 653-658, as discussed in Trubek, *Max Weber. . .*, *supra* note 126, 729-30 and 735-36. All English quotations from and references to Weber are from G. ROTH AND R. WITTICH, (eds.), MAX WEBER, ECONOMY AND SOCIETY, (3 Vols.), 1968, as referred to by Trubek.

distinct legal profession, a "status group." Such a professional legal class was a pre-requisite for the ideal type of legal system—or to put it another way, a professional legal class was a necessity for the rule or domination of law. Of course, Weber's typology was based primarily on an understanding of Continental and German (but not English) history and law, and to him the English common law system was "a deviant case;"[128] that capitalism first emerged in England in such a case was a mystery, (the "England problem").[129] England's legal system, "while far from the model of logically formal rationality, was sufficiently calculable to support capitalism since judges were favorable to capitalists and adhered to precedent."[130]

As a result of the "professional" definition of the common law, the understanding of the "common law" is seen almost solely through the eyes of practitioners, and is perceived as *judge-made* law. This in turn has meant that the investigation of *constitutional* history as opposed to *legal* history as commonly now practiced has become the province of historians, specialists in government, and political scientists, and not that of lawyers.[131] Great strides have been made by modern non-legal scholars in the field of constitutional history and in stringent re-examination of legal sources and constitutional historiography, examples[132] include publications by J. G. A. Pocock,[133] the Cambridge Studies in Early Modern British History, historian Glenn Burgess,[134] political scientist Alan Cromartie,[135] and

128. To quote Trubek at 746.

129. WEBER, *supra* note 127, 814, *and see also* WEBER 3 ECONOMY AND SOCIETY, *supra* note 127, 977.

130. Trubek, *supra* note 127, 747-48, paraphrasing WEBER at 3 *Economy and Society*, 1395; see also WEBER, *id.*, 2: 890-91; see also David d'Avray, *Max Weber and Comparative Legal History*, in LAW AND HISTORY, *supra* note 116, 189-199, 196.

131. C.f. Loengard. *Beyond Maitland. . .,supra* note 118, 530, n. 1.

132. These are merely some examples.

133. J. G. A. POCOCK, now Harry C. Black Emeritus Professor of History at John Hopkins University and author of, amongst many others, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW, (Cambridge University Press, Cambridge, 1957, 2nd edn 1987); THE MACHIAVELLIAN MOMENT, (Princeton University Press, Princeton 2nd paperback edition 2003), BARBARISM AND RELIGION, in 4 Volumes, latest volume (4), BARBARIANS, SAVAGES AND EMPIRES, (CUP 2005).

134. GLENN BURGESS, Professor of Early Modern History, Hull University, and author of *The Divine Right of Kings Reconsidered*, 1992 ENGLISH HISTORICAL REVIEW, October 1992, 836-861; THE POLITICS OF THE ANCIENT CONSTITUTION, AN INTRODUCTION TO ENGLISH POLITICAL THOUGHT, 1603-1642, (Pennsylvania State University Press, University Park, Philadelphia, 1993); ABSOLUTE MONARCHY AND THE STUART CONSTITUTION, (Yale University Press, New Haven, 1996); *The "Historical Turn" and the Political Culture of Early Modern England: Towards a Post-modern History?* in NEO-HISTORICISM, ROBIN HEADLAMP WELLS, GLENN BURGESS and ROWLAND WILMER (eds.), (D. S. Brewster, Cambridge, 2000), 29-47, *and see also* the *Introduction* by the editors to that book.

135. ALAN CROMARTIE, Reader in Politics, Reading University, author of SIR MATTHEW HALE: LAW, RELIGION AND NATURAL PHILOSOPHY, (Cambridge University Press 1995, 2003), with QUENTIN SKINNER editor of WRITINGS ON COMMON LAW AND HEREDITARY RIGHT (CLARENDON EDITION OF THE WORKS OF THOMAS HOBBES) (Oxford University Press 2005); THE CONSTITUTIONALIST REVOLUTION: AN ESSAY ON THE HISTORY OF ENGLAND, 1450-1642 (Ideas in Context, Cambridge University Press, 2006); *Harringtonian Virtue: Harrington, Machiavelli, and the Method of the Moment*, 41 THE HISTORICAL JOURNAL (1998), 987-1009; *Unwritten law in Hobbesian political thought*, 2 BRITISH JOURNAL OF POLITICS AND INTERNATIONAL RELATIONS, 2000, 161-178; *The Constitutionalist Revolution: The Transformation of Political Culture in Early Stuart England*, 163 PAST AND PRESENT, 1999, 76-120.

government specialist, Vernon Bogdanor.[136]

In addition many scholars have tended to see the work of F. W. Maitland and Sir Frederick Pollock in their *History of English Law*[137] as being critical to their understanding of the common law.[138] To be fair to Maitland, however, it must be noted that he and Pollock specifically eschewed dealing with "constitutional history" in that work, paying tribute in particular to the work of Stubbs,[139] so that *The History of English Law* does not concern itself overmuch with the public face of the law, something which Maitland had earlier undertaken in his 1887-1888 lectures at Cambridge, subsequently published in 1908 as his *The Constitutional History of England.*[140] Nor does it concern itself much with Anglo-Saxon law, Pollock (whose sole contribution was the Anglo-Saxon chapter) stigmatizing Anglo-Saxon law as "archaic."[141] It was not until the great work of the late Patrick Wormald[142] that Anglo-Saxon law began to takes its rightful place in twentieth and twenty-first century scholars' understanding of the development of English law.

V. THE IMPORTANCE OF ANGLO-SAXON LAW

With the honourable exception of the late Patrick Wormald,[143] many modern historians, legal historians, and lawyers,[144] have assumed or asserted that the common law somehow or other began after the Conquest of

136. VERNON BOGDANOR, Professor of Government at Oxford University, Gresham Professor of Law, Fellow of the British Academy and Honorary Fellow of the Institute for Advanced Legal Studies; author of THE NEW BRITISH CONSTITUTION, (forthcoming, Allen Lane, 2009); DEVOLUTION IN THE UNITED KINGDOM, (OUP, 2nd rev. ed. 2001); with DAVID BUTLER and ROBERT SUMMERS, editor of THE LAW, POLITICS, AND THE CONSTITUTION: ESSAYS IN HONOR OF GEOFFREY MARSHALL, (OUP USA 1999); THE MONARCHY AND THE CONSTITUTION, (OUP, London, 1996); and many others.

137. SIR FREDERICK POLLOCK and F. W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 2 Vols., (Cambridge University Press, Cambridge, 1895, 2nd edn 1898, 1911). *But see* Patrick Wormald's observations as to the attitudes of Maitland and Pollock to Anglo-Saxon law in WORMALD'S MAKING OF ENGLISH LAW, *supra* note 65, 3-4, 15-20.

138. *See* most works in JOHN HUDSON, (ed.), THE HISTORY OF ENGLISH LAW, CENTENARY ESSAYS ON "POLLOCK AND MAITLAND", (Oxford University Press, Oxford, 1996, 1997).

139. *See* MAITLAND AND POLLOCK, HISTORY, *supra* note 137, xxxvi-xxxvii, and 136 n. 1.

140. F. W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND, a series of lectures given in Cambridge from 1887-1888, (Cambridge University Press, Cambridge, 1908, 1950).

141. *See e.g.*, MAITLAND AND POLLOCK, HISTORY, *supra* note 137, Chapter 2, 38 ("So far as we can say there was any regular judicial system in Anglo-Saxon law, it was of a highly archaic type;" and "archaic rules of evidence;" and 43, "usual archaic features." *And see* WORMALD, MAKING OF ENGLISH LAW, *supra* note 65, at 3, and 15-16.

142. WORMALD, *id.*,.

143. WORMALD, MAKING OF ENGLISH LAW, *supra* note 65. CAMPBELL, JOHN and WORMALD, THE ANGLO-SAXONS, *supra* note 111; Other scholars who deal with the development of the common law under the Anglo-Saxons are: LISI OLIVER, THE BEGINNINGS OF ENGLISH LAW, (University of Toronto Press, Buffalo, 2002) and ANN WILLIAMS (a medieval historian), KINGSHIP AND GOVERNMENT IN PRE-CONQUEST ENGLAND, c. 500-1066, (MacMillan Press, London, 1999).

144. E.g. Paul Hyams, *Norms and Legal Argument before 1150*, in LAW AND HISTORY, *supra* note 116, 41-61 at 41; S. F. G. MILSOM, A NATURAL HISTORY OF THE COMMON LAW, (Columbia University Press, New York, 2003), 1, 105-6 and *passim*; JOHN HUDSON, THE FORMATION OF THE ENGLISH COMMON LAW, LAW AND SOCIETY IN ENGLAND FROM THE NORMAN CONQUEST TO MAGNA CARTA, (Longman, New York, 1996), xi; J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY, (Butterworths, London, 4th edition, 2002), 12; PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW, *supra* note 92, 13.

England by William of Normandy,[145] and usually dated its emergence to some time around that of Henry II,[146] because of the rationalization of writ processes and court structures during his reign. That this occurred then is unsurprising, given the disjunction caused by the preceding civil war between Stephen and Matilda.[147] It should not, however, be therefore deduced that there had previously been no law which was common to the English.

While even F.W. Maitland appeared to think that there could not be a "common law" before the Norman Conquest,[148] as Wormald noted in *The Making of English Law*[149] this view resulted from the then deeply embedded preconceptions of Anglo-Saxon law;[150] Maitland also distrusted his own ability to grasp Anglo-Saxon,[151] while being overly-deferential to the "Teutonic" continental tradition.[152] Maitland himself, however, noted that "a great deal more may yet be done towards reconstructing the Anglo-Saxon legal system" while noting that it was not a matter for "beginners."[153]

Certainly, it seems that the views on the common law attributed to Maitland and Sir Frederick Pollock in their *History of English Law* had a lasting influence on scholars.[154] G. D. G. Hall asserted that "what is clear is that it (the common law) is a product of the twelfth century,"[155] referring to Maitland's and Pollock's "masterly survey."[156] But while Hall refers to

145. C.f., GEOFFREY CHAUCER, servant and courtier to Edward III, Richard II and Henry IV, in describing the sergeant at arms, wrote: "In ternes hadde he caas and doomes alle/That from the tyme of kyng William were falle."—see *General Prologue* (c. 1387-92) to THE CANTERBURY TALES, I(A) 323-324, in THE WORKS OF GEOFFREY CHAUCER, (ed.) F. N. ROBINSON, (London: Oxford University Press, 2nd edition, 1957), 20.

146. King of England, 1154-1189

147. For background, *see* KEITH J. STRINGER, THE REIGN OF STEPHEN, KINGSHIP, WARFARE AND GOVERNMENT IN TWELFTH-CENTURY ENGLAND, (Lancaster Pamphlets, London, 1993); EDMUND KING, (ed.), THE ANARCHY OF KING STEPHEN'S REIGN, (Clarendon Press, Oxford, 1994); and MARJORIE CHIBNALL, THE EMPRESS MATILDA: QUEEN CONSORT, QUEEN MOTHER AND LADY OF THE ENGLISH (Blackwell, Oxford, 1991, 1999).

148. MAITLAND, *supra* note 140, at 3.

149. WORMALD, *supra* note 143.

150. WORMALD, *supra* note 143, at 14.

151. C. H. S. FIFOOT, (ed.), THE LETTERS OF FREDERIC WILLIAM MAITLAND, Vol. 1, (Selden Society, Supplementary Series 1, London, 1965, No. 394 1904); and P. N. R. ZUTSHI, (ed.), THE LETTERS OF FREDERIC WILLIAM MAITLAND, Vol. 2, (Selden Society, Supplementary series, 11, London, 1965, No. 311, 1905) (cited and quoted by Patrick Wormald, *Maitland and Anglo-Saxon Law: Beyond Domesday Book*, in HUDSON, (ed.), CENTENARY ESSAYS *supra* note 151, 1-20 at 5, n. 19.

152. WORMALD, *supra* note 143, at 15-20; *see generally* Wormald, *supra* note 151, especially at 4-5; *see also* MAITLAND, *supra* note 140, at 5.

153. — amongst whom seemingly he included himself —MAITLAND, *supra* note 140., at 5, and WORMALD, *supra* note 143, at 16.

154. MAITLAND, *supra* note 137; *see also* most of the contributions in HUDSON, *supra* note 151, at 5, n. 19.

155. HALL, *supra* note 120, at xi.

156. HALL, *supra* note 120, xi, n. 3; *see also* HUDSON, *supra* note 144, at 19, 20-21, 22-23; note, however, that Hudson does not dismiss the relevance of Anglo-Saxon origins of the common law, but does appear to agree that Henry II's changes, together with Anglo-Saxon inheritances, 'combined to form the common law' at that time.

parts of the *History* which do in fact relate to the twelfth century,[157] Maitland does not specifically state anything about "the common law" in those Chapters, except to say that the results of Henry II's activity "were regarded, not as the outcomes of ordinances, but as part and parcel of the traditional common law,"[158] noting that under his reign "the whole of English law is centralized and unified by the institution of a permanent court of professional judges. . ."[159] It is in fact in the next Chapter that Maitland speaks at more length of the "common law"—writing of the time of Henry III in the thirteenth century he states: "The term *common law* (*ius commune, lex communis, commun droit, commune lei*) is not as yet frequent in the mouths of our temporal lawyers. On the other hand, *ius commune* is a phrase well known to the canonists."[160]

In fact, however, Bracton uses the term *ius commune* quite often, but always appears to be using it in the sense of "common *right*,"[161] a phrase analogous to the Anglo-Saxon *folcriht* or folk-*right*,[162] and not in the sense of "common *law*" as currently understood by lawyers (or by Maitland in the nineteenth century); moreover, it appears that Bracton saw this "common right," together with the "the laws of the land" (*legem terræ*) and the "customs of the realm" as being part of "the law."[163] Thus, while it is true

157. HALL, *supra* note 155, (referring to the second edition of Maitland and Pollock's HISTORY, *supra* note 137, at 1: 107-110 (from Chapter 4, *England under the Norman Kings*, primarily referring to Henry I), and 1: 136-173 (Chapter 6, *The Age of Glanvill*)).

158. MAITLAND, *supra* note 137, 136-37.

159. MAITLAND, *supra* note 137, 138.

160. MAITLAND, *supra* note 137, at 176 ("Common law" is indexed as appearing in only 3 instances. This Article does not investigate the interrelationship between the laws of England and the civil law or *ius commune—for discussion see* R. H. Helmholz, *The Learned Laws in "Pollock and Maitland,"* in HUDSON, *supra* note 151, 145-69; R. H. HELMHOLZ, THE *ius commune* in England : Four Studies, (Oxford Univ. Press, 2001).

161. BRACTON, *supra* note 5; (2: 73)—*Item poterit condicio impedire descensum ad proprios heredes contra* ius commune (A condition may prevent descent to hereditary heirs against common right {my translation: Thorne's is . . . "right heirs against common right."}); (2: 148)—*Item poterit donator ex speciali conventione contra* ius commune *condicionem suam meliorem facere in causa donationis. . . et sic poterit tenens gratis renuntiare his quæ pro se introducta sunt a lege contra* ius commune (A donor by special agreement, contrary to common right, may improve his position by the cause/purpose of the gift {Thorne : *causa*}. . . And thus a tenant may freely renounce, contrary to common right, what was introduced for his protection by the law.) (3: 79)— *Item si impetratum fuerit contra* ius commune (Also if the action has been brought contrary to the common right {my translation : Thorne's is: "Also if it has been impetrated contrary to the common law. . ."}; (3: 232)—*Item iniuste ut si contra* ius commune, (or unjustly according to common right {my translation : Thorne's is: "contrary to common right"}); (4: 84)—*quia in casu supra dicto* ius commune *participum recipit divisionem.* (because in the case mentioned above, the common right of the participants admits of division {my translation : Thorne's is "because there the common right of the parceners admits of division"}. While the attribution of the work to Bracton is of considerable antiquity, it now seems that the bulk of the work was written in the 1220s and 1230s by persons other than Bracton himself. It seems to have been edited and partially updated later in the late 1230s, with various additions being made to it between t h at time an d the 1250s. The last owner of the original manuscript and the author of the later additions was probably Bracton—from Harvard Law School Library, HTTP://HLSL5.LAW.HARVARD.EDU/BRACTON/ (last visited November 21, 2005).

162. As in the Laws of Cnut (II Cnut, c. 1) and Laws of Edward (I Edward, Preamble), see details *infra* in text accompanying notes 189-195.

163. *E.g.*, BRACTON, *supra* note 5, 2: 373 (*"Cum autem utlagaria ipso iure nulla eo quod* contra legem terræ et consuetudinem regni *promulgata, sive subfuerit causa vera vel præsumptiva sive omnino nulla, secundum quod perpendi poterit ex præmissis, talis de iure recipi debet ad gratiam et de iure ad*

that the *common right* was contrasted with written laws, and with customs of the realm[164] endorsed by the king, there is no suggestion that only one was common throughout the kingdom, nor that the "unwritten law" or the pronouncements of judges necessarily had some special entitlement to being called "common." This kind of thinking was of a much later date. Indeed, much earlier, Henry I had sworn to eradicate bad customs, setting in their place ones more just[165] and to apply the laws of King Edward as had been changed by William I[166]—this confirmation and maintenance of earlier just laws (*leges, leys*), customs (*consuetudines, custumus*) and freedoms (*libertates, franchises*) demonstrates the application of law as common throughout the kingdom, being derived from concepts of justice and right as enunciated in the oath of governance.

But the idea of a common law, and of the law subsisting in justice and right had a much longer genealogy than this. While there are suggestions which should be taken seriously by scholars that much of the Anglo-Saxon

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omnia restitui ac si non esset ab initio utlagatus. [When the outlawry is void *ipso jure* because promulgated CONTRARY TO THE LAW OF THE LAND AND THE CUSTOM OF THE REALM, he ought to be restored and as may be drawn from what has been said above, admitted to grace of right to everything *de jure*, as though he had never been outlawed.]) (emphasis added).

164. BRACTON, *supra* note 5, 2: 19—*Cum autem fere in omnibus regionibus utatur legibus et iure scripto, sola Anglia usa est in suis finibus iure non scripto* et consuetudine. *In ea quidem ex non scripto ius venit quod usus comprobavit* (Though in almost all lands use is made of the *legibus* and the *iure scripto*, England alone uses unwritten law AND CUSTOM. {my emphasis} There law derives from nothing written but from what usage has approved); 2: 21— *Huiusmodi vero leges Anglicanæ* et consuetudines *regum auctoritate iubent quandoque, quandoque vetant, quandoque vindicant et puniunt transgressores. Quæ quidem, cum fuerint approbatæ consensu utentium* et sacramento regum confirmatæ, *mutari non poterunt nec destrui sine communi consensus eorum omnium quorum consilio et consensu fuerint-promulgatæ* (And because in truth these English laws and customs, by the authority of kings, sometimes command, sometimes forbid, sometimes castigate and punish offenders. Since they have been approved by the consent of those who use them and CONFIRMED BY THE OATH OF KINGS, they cannot be changed without the common consent of all those by whose counsel and consent they were promulgated, they cannot be nullified without their consent.); 2: 22—*Consuetudo vero quandoque pro lege observatur in partibus ubi fuerit more utentium approbata, et vicem legis obtinet. Longævi enim usus et consuetudinis non est vilis auctoritas* (Custom, in truth, in regions where it is approved by the practice of those who use it, is sometimes observed as and takes the place of *lex*. For the authority of custom and long use is not slight)

165. Henry I's coronation oath "*Qui consecrationis suae die, sanctam Dei ecclesiam, quae fratris sui tempore vendita et ad firmam erat posita, liberam fecit, ac omnies malas consuetudines et injustas exactiones quibus regnam Angliiae injuste opprimebatur, abstulit, pacem firmam in toto suo regno posuit et teneri praecepit, legem regis Eadwardi omnibus in commune reddidit, cum illis emendationibus quibus pater suus illam emendavit*" as quoted by Robert S. Hoyt, *The Coronation Oath of 1308: the background of "Les Leys et les Custumes,"* 11TRADITIO, 235, 239 (1955), from FLOR. WIG. (FLORENCE OF WORCESTER—for reference, see *infra* note 235) II 46f.; *see also* Henry I's Coronation Charter 1100—*Et omnes malas consuetudines quibus regnum Angliae injuste opprimebatur inde aufero; quas malas consuetudines ex parte hic pono:. . .*"And all the evil customs by which the realm of England was unjustly oppressed will I take away, which evil customs I partly set down here. . ."—Latin from WILLIAM STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY, 117-118 (H. W. C. DAVIS ed. Clarendon Press, 9th ed. 1962) (1870) (translation from, SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY, 5 (G. B. ADAMS & H. M. STEVENS, eds. Macmillan Company, 1910)).

166. This is a reference to Edward the Confessor, who made no laws, but is intended to refer to the Anglo-Saxon laws, primarily those of Cnut, and (just) amendments thereto made by William I. *See* C. WARREN HOLLISTER, HENRY I, 112 (Yale Univ. Press 2001); *See* WORMALD, *supra* note 143, at 400-401.

law as we know is heavily indebted to Celtic sources,[167] this Article will discuss the evolution of a common law of *justice and right* only from the time of the Anglo-Saxons, particularly Alfred the Great and his successors.

A. Alfred the Great's Laws

In Anglo-Saxon times, judgements or edicts were knows as Dooms—Kings uttered (in the sense of giving out) their Dooms (from O.E. *dóm*, meaning judgement, sentence, ruling, law), often with the advice of their *witan*. These Dooms were means by which the society was ordered, and infractions of the peace penalized. While most Anglo-Saxon laws were not written down, and matters of proof in a law suit determined very much upon a person's oath (either to the gods or to God), this does not mean that the laws were not known, though many of the written laws have been lost.[168] However, after the advent of Augustine in 597, who converted Æthelberht King of Kent and *Bretwalda*, the Dooms began to be written down after the Roman fashion: this did not mean that they were in any sense "Roman" rather than indigenous, but rather that they were actually written down, as the Romans had written down their edicts. The first known written Dooms were those of Æthelberht, c. 601.[169] Anglo-Saxon laws tended to have a standardized beginning: the king would identify himself, authorize the law himself, adverting to the advice and counsel he had received before making the laws, advise the purpose of the laws, and then itemize them.[170]

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167. Michael Treschow, *The Prologue to Alfred's Law Code: Instruction in the Spirit of Mercy*, 13 FLORILEGIUM, 79-110 (Univ. of Western Toronto 1994) (referring to Dafydd Jenkins, *The Medieval Welsh Idea of Law*, TIJDSCHRIFT VOOR RECHTSGESHIEDENIS 49, at 343–48 (1981)); Robin Chapman Stacey, *Law and Order in the Very Old West: England and Ireland in the Early Middle Ages*, in CROSSED PATHS: METHODOLOGICAL APPROACHES TO THE CELTIC ASPECT OF THE EUROPEAN MIDDLE AGES, 49–54 (M. D. LATHAM ed. Univ. Press of America, 1991); *see also* Janet L. Nelson, *The Earliest Surviving Royal Ordo: Some Liturgical and Historical aspects*, in AUTHORITY AND POWER, STUDIES ON MEDIEVAL LAW AND GOVERNMENT PRESENTED TO WALTER ULLMANN ON HIS SEVENTIETH BIRTHDAY, 41(Brian Tierney and Peter Linehan eds.,Cambridge Univ. Press, 1980) (especially note 59 referring to her papers in JOURNAL OF ECCLESIASTICAL HISTORY, XVIII 48, n. 4); *see also* Nelson' s references to J. Prelog, *Sind die Weihesalbungen insularen Ursprungs?*, 8 FRÜHMITTELALTERLICHE STUDIEN, 303-56 (1979).

168. The Dooms of Æthelberht, Hlothhere and Eadric survive, but those of Offa are lost. For a coverage of the Old English Dooms, *see* ATTENBOROUGH, *supra* note 108; *see also* THORPE, *supra* note 105.

169. ATTENBOROUGH, *supra* note 108.

170. For a typical law, see the Dooms of Ine, King of Wessex c.688—*Ic Ine, mid Godes gife, wesseaxna kyning, mid geðeahte 7 mid lare Cenredes mines fæder 7 Heddes mines biscepes 7 Eorcenwoldes mines biscepes, [7] mid eallum minum ealdormonnum 7 ðæm ieldstan witum minre ðeode 7 éac micelre gesomnunge Godes ðeowa, wæs smeagende be ðære hælo urra sawla 7 be ðam staþ ole ures rices, þætte ryht æw 7 ryhte cynedomas ðurh ure folc gefæstnode wæron, þ ætte nænig earldormonna ne us undergeðeodedra æfter þam wære awendende ðas ure dómas.*[I, Ine, by the grace of God king of the West Saxons, with the advice and instruction of Cenred, my father, of Hedde, my bishop, and of Erconwald, my bishop, and with all my ealdormen [nobles] and the [who are the] chief councillors of my people [witan of my people/nation], and with great concourse of the servants of God [God's people] as well, have been taking counsel for the salvation of our souls and the security [stability] of our realm [rices/kingdom/realm], in order that just law and just decrees[just king's judgements/laws] may be established and ensured [held fast] throughout our nation[people], so that no ealdorman nor subject of ours [people under my rule] may from henceforth [after this] pervert [turn from/avoid] these our decrees

The most significant of the written Anglo-Saxon laws was that of Alfred the Great.[171] Alfred had collected all laws which he considered most just (*ryhtoste*) into a *domboc*[172] (book of *dooms*/judgments/edicts/laws) or Code.[173] Notably, however, the Code was introduced by a Prologue consisting in the Ten Commandments and Alfred's translation of parts of Exodus.[174] It was on the basis that these biblical commands were law/*dooms* that after their enunciation, Alfred went on to state (on the basis of the biblical example) that he had gathered together such pre-existing laws as seemed to him just in the Code.[175]

And even more significantly, Alfred carefully adapted some of the translations from the Latin to fit current circumstances, more than a few being directed squarely at judges—

Leases monnes word ne rec ðu no þæs to gehieranne, ne his domas ne geðafa ðu, ne nane gewitnesse æfter him ne saga ðu. (El. 40)	Do not receive the word of a liar, or consent to his judgments, or repeat any of his testimony.

[laws]. . . [and then sets out specific laws]—from ATTENBOROUGH, *supra* note 108, 40-45 (words in brackets my translation).

171. Alfred the Great, king 871-899.

172. WORMALD, *supra* note 143, Table 3.1 (Date of Alfred's *domboc* c. 895).

173. LAWS OF ALFRED, Introduction, c. 49, § 9 ("*Ic ða Ælfred cyning þás togædere gegaderode, 7 awritan het monege þara þe ure foregengan heolden. ða ðe me licodon; 7 manege þara þe me ne licodon ic áwearp mid minra witena geðeahte, 7 on oðre wisan bebead to healdanne. Forðam, ic ne dorste geðrislæcan þara minra awuht fela on gewrit settan, forðam me was uncuð, hwæt þæm lician wolde, ðe æfter ús wæren. Ac ða ð e ic gemette awðer oðde on Ines dæge, mines mæges, oðde on Offan Mercan cyninges oðde on Æþelbtyhtes, þe ærest fulluhte onfeng on Angelcynne, þa ðe me ryhtoste ðuhton, ic þa heron gegaderode, 7 þa oðre forlét. Ic ða Ælfred Westseaxna cyning eallum minnum witum, þ as geeowde, 7 hie ða cwædon, þæt him þæt licode eallum to healdanne.*" [I then, Alfred, king, have gathered together these [*dooms*] and ordered that many of them which our forefathers upheld which were pleasing to me be written down, and those which were not pleasing to me I, with the advice of my *witan*, rejected and in other wise ordered them to be observed. For I durst not venture to set down in writing much of my own, for it was unclear to me which of them would please those who should come after us. But those [*dooms*] which I met with/knew whether from the days of Ine, my kinsman, or of Offa King of the Mercians, or of Æþelberht, the first of the English race to receive baptism, which seemed to me to be most just (*ryhtoste*), those I have gathered here together and the rejected the others. I then, Alfred, king of the west-Saxons, have shown these [*dooms*]/this collection to all my *witan* and they all declared that it was pleasing to them all that they should be observed/held.]) (my translation). *See also* ASSER, §106, in (eds.), ASSER'S LIFE OF KING ALFRED THE GREAT AND OTHER CONTEMPORARY SOURCES, 109-110 (S. Keynes & M. Lapidge ed. Penguin, 1983); *and see* WORMALD, *supra* note 143, 118-25.

174. The prologue also included Christ's statement from the Sermon of the Mount that he had come not to abolish the law but to fulfil it. *Matt.* 5:17. Accompanying this brief excerpt is the observation that Christ taught mercy and gentleness. El. 49; a translation of Acts 15, which records the Church's conciliar decree that freed the Gentile Christians from a full obligation to Mosaic law. This excerpt too has an accompanying observation, that whoever knows and keeps the law of charity has no need of a law book to guide his judgments (El. 49.1–El. 49.6); a description of how Christian synods have decreed that Christian nations may, for the sake of mercy, exact monetary compensation instead of corporal or capital punishment (El. 49.7–El. 49.8), while recognizing that the synods recognized a limit to such mercy: that merciful allowance of compensation not be repeated in the case of a second crime, and no compensation whatsoever in cases of treachery against one's lord. *See* Treschow, *supra* note 167, at 79-110.

175. Refer to translation, *supra* note 173.

Ne wend ðu ðe no on þæs folces unræd 7 unryht gewill on hiora spræce 7 geclysp ofer ðin ryht, 7 ðæs unwisestan lare ne him ne geðafa. (El. 41)	Do not turn, contrary to your duty, to the people's ill-counsel and unjust desire in their talk and clamour, and do not allow them that very unwise advice.
Dem ðu swiðe emne. Ne dem ðu oðerne dom þam welegan, oðerne ðam earman; ne oðerne þam liofran and oðerne þam laðran ne dem ðu. (El. 43)	Judge very fairly. Do not judge with one judgment for the rich and another for the poor, nor one for those you like and another for those you dislike.
Ne onfoh ðu næfre medsceattum, forðon hie ablendað ful oft wisra monna geðoht 7 hiora word onwendað. (El. 46)[176]	Never take bribes, for they all too often blind the thought of wise men and corrupt their word.

Michael Treschow makes a convincing argument through a forensic analysis of Alfred's translation from the Latin into Anglo-Saxon for a deliberate attempt by Alfred to set directions upon his officials, but particularly his judges, due in part as a warning against evil influence on judicial decisions, perhaps in response to (according to Asser if he may be believed)[177] "Alfred's difficulties with corrupt judges."[178]

The gist, both of the Prologue and the purpose of the following laws, was summed up by the first heading of the "contents'—*Be ðon þæt mon ne scyle oþrum deman buton swa he wille, þæt him mon deme.* [That a man ought not judge another except as he would want himself to be judged], and by the final statement in the Prologue itself: *þæt ge willen, þæt oðre men eow ne don, ne doð ge ðæt oþrum monnum* [that what you do not want done to yourselves do not to others.] Treschow suggests that this form of the Golden Rule, and the whole prologue and the laws in the context of the prologue, is addressed to judges in particular, because of the use of the word *deman* (judge), so that they might understand the spirit in which the law is to be applied, a spirit of fairness and kindness, even of mercy. He suggests that this

> peculiar interest in instructing judges corresponds to the careful concern over judicial matters that Asser[179] described Alfred as showing—he watched his judges closely, and would not tolerate injustice or negligence on their part.

176. This text and the translation is that of Treschow, *supra* note 167, at 100-02. *See* THORPE, *supra* note 105, at 24-25 (Anglo-Saxon text and a translation).

177. For some of the problems relating to Asser, *see* KEYNES, *supra* note 173, at Introduction.

178. Treschow, *supra* note 167, at 101.

179. ASSER, ASSER'S LIFE OF KING ALFRED, 106 (W. H. STEVENSON ed., Oxford Univ. Press, 1904) (as referred to by Treschow, *supra* note 167).

> Whenever he found someone judging poorly he would upbraid him severely and thereupon require him either to relinquish office or take up an intense study of wisdom (*sapientia*).[180]

And here Treschow quotes Alfred thus:

> Nimium admiror vestram insolentiam, eo quod, Dei dono et meo, sapientium ministerium et gradus usurpastis, sapientiae autem studium et operam neglexistis [I am thoroughly astounded at your audacity that you would assume, under God's and my authority, the function and status of wise men, yet neglect the study and practice of wisdom].[181]

Treschow continues:

> This entailed the reading of texts whose authority in wisdom was established, surely patristic and scriptural texts. For Asser refers to reading with the phrase *litteralia studia*, which would seem to indicate that their deficiency was in Latin letters, not in the established body of Anglo-Saxon legal texts. Those who could not read were required to have others read to them. Such an admonition echoes Alfred's preface to the Pastoral Care, where he calls for an educational reform based on Latin writings that offer wisdom. Asser's *Life* evidently closed before Alfred turned to his own legal reform, for it makes no mention of the law code. Yet from what he says of Alfred's intentions we can infer that this opening document is meant to help those without Latin. We can consider it a quick course in jurisprudential wisdom for the magistrates who are to execute the law that follows.[182]

These observations by Treschow are supported by Patrick Wormald's more recent work, where Wormald's investigations of the Anglo-Saxon laws concludes that Alfred exercised "appellate jurisdiction over his officials and investigated their decisions even on cases not formally submitted to him," agreeing that Alfred required his judges to know the law, and to learn to read. He discusses, for example, a long-running case (*The case of Helmstan and Fonthill*)[183] which involved a very rich man, who on committing a crime had his property of Fonthill confiscated and the subsequent disputes over ownership of the property, the experimental nature of the

180. Treschow, *supra* note 167, at 81.

181. Treschow, *supra* note 167, at n. 2.

182. Treschow, *supra* note 167, at 81-82.

183. WORMALD, *supra* note 143, at 144-148; The Case of Helmstan and Fonthill, 900 A.D., LS23-26, S1445, (this is my naming of the case).

script perhaps indicating the judge involved had taken Alfred's advice seriously and was learning to write himself rather than dictating his records.[184]

In addition, there was no paucity of dooms as made by the judges. Patrick Wormald states that despite the scarcity of written artefacts of Anglo-Saxon case law, (much of which he believes existed sometimes as "loose-leaf," and others in books which were subsequently destroyed or defaced)[185] he has been able to find written records of 179 or 180 law suits heard,[186] the earliest of which for which he has documentary evidence being dated 736.[187] Clearly at one time, there were considerably more records of Anglo-Saxon "case law."

Throughout the Anglo-Saxon of the Code are references to that which is *riht* (right, straight, just), which in turn must be adhered to by both judges and administrators, and that which is *unriht* (un-right, crooked, wrong, unjust) which must be eschewed by judges and administrators. This *unriht* is that same "crooked" to which Coke referred.[188]

B. The folcriht, The King's Peace and the Common law

The "common right" to which Bracton adverted[189] was of ancient lineage; the idea of the "common right" or the *folcriht* had been explicit in the Anglo-Saxon laws. Moreover, the *folcriht* was mandated as a source of law to be taken into account by the judges, together with the written laws, from at least the time of Edward the Elder, king c. 899-925.[190] The application of the common right, together with the dooms and edicts, were to applied in common to everyone—for example, the laws of Cnut[191] stated:

> That is then the first that I will: that just [*rihte*] laws be established, and every unjust law [*unlage* 'unlaw'] be carefully suppressed, and that every injustice [*unrihte*] be weeded out and rooted up, with all possible diligence, from this country. And let God's justice [*riht*] be exalted; and henceforth let every man, both poor and rich, be esteemed worthy of the

184. WORMALD, *supra* note 143, at 145-6, n. 98.

185. WORMALD, *supra* note 143, 180-81.

186. WORMALD, *supra* note 143, 143-44.

187. Wormald's listing LS1, S1429, *supra* note 143, at 181; *see also* CARTULARIUM SAXONICUM, 156 (W. de Gray Birch, ed., 1885-99).

188. *See* text to which accompanying notes 27, 38, and 82 *supra* refers.

189. See discussion *supra* under the heading "*V. The Importance of* Anglo-Saxon Law."

190. 1 Edward, Preamble: *Eadwerd cyning byt ðam gerefum eallum, ðæt ge deman swa rihte domas swa rihtoste cunnon, 7 hit on ðære dombec stande. Ne wandiað for nanum ðingum folcriht to geregceanne; 7 ðæt gehwile spræce habbe andagan, hwænne heo gelæst sy, þ æt ge ðonne gereccan.* [Edward king, commands all reeves: that you give in judgment such right/just judgments/*dooms* as you know to be the most right/just (*rihtoste*), and that are in the *domboc* {book of law/written law/book of *dooms*.} Nor shall you for any reason/thing fail to explain/relate/take account of the *folcright*; and that at the same time it is your duty to have a date fixed for every decision in a case. [my translation drawing on Attenborough, *supra* note 108, 114.] *See also* II Edgar, c. 1, in THORPE, ANCIENT LAWS, *supra* note 105, 112 ("I will that every man be worthy of the folcriht, as well poor as rich and that and that righteous dooms be judged to him.")

191. Cnut, king of England, 1016-1035; king also of Denmark, and Norway.

> folkright, [*folcrihtes*] and let just dooms [*rihte domas*] be doomed to him.[192]

In addition, the laws of Cnut were common in the sense of being general and common to the whole land,[193] and common in the sense of applying to rich and poor alike[194] and to all inhabitants independent of race.[195] Therefore, this law which was "common" consisted not just of any judgments or dooms made by those judging on behalf of the king, but also all edicts and written laws—this had been so not only under Cnut, but also under preceding kings of the English.[196]

So there is evidence of a uniform system of laws both written and unwritten which included the just laws made by the king, and the folkright, both of which must be adhered to by judges in order that they do right, *riht*, or justice; cases being decided upon the basis of the laws; and the king demanding that judges judge in accordance with the laws, having regard to mercy.

This concept of a uniform application of laws in common through the English realm went hand in hand with the establishment of the King's Peace. While the establishment of the King's Peace over the English as a nation can be traced from the time of the first written dooms,[197] and also from the laws of Edward the Elder,[198] more complete evidence of its application can be found in the Dooms of Æthelstan (c. 925-939). He stated that his *witan* has advised him that he had too long suffered the fact that his peace (*ure friþ* our peace)[199] was not rightly kept.[200] The king's personal

192. II Cnut, c. 1, (secular laws) in THORPE, *supra* note 105, at 161 (my extrapolations in brackets.)

193. II Cnut (secular laws) Prologue ("and I will that it [the secular laws] be observed over all England [*eall Englaland*]" from THORPE, *supra* note 105, at 161.

194. E.g. II Cnut, c. 1, *supra* note 192.

195. Cnut, 1020—"If any be so bold, clerk or lay, Dane or English, as to go against God's laws and against my royal authority, or against secular law, and be unwilling to make amends, and to alter according to my bishop's teaching, then I pray Thurcyl my earl, and also command him, that he bend that unrighteous one to right if he can; if he cannot, then will I with the strength of us both that he destroy him in the land or drive him out of the land, be he better, be he worse. . ." This has been described as a writ, or as a "letter proclamation" or Cnut's "first letter to the English," manifested after Cnut's Oxford Code of 1018, but before his Winchester Code—WORMALD, *supra* note 143, at Table 3.1, 114, 196, 319, 346-48; *see also* the translation in STUBBS, *supra* note 165, 90, 91; Anglo-Saxon text available in F. LIEBERMANN, *infra* note 238, at i, 273.

196. STUBBS, *supra* note 165, at 90, 91 (Cnut 1020—"and I will that all people, clerk and lay, hold fast Edgar's [king 959-975] law. . .")

197. The first of the written Dooms of Æthelberht, 601, to keep the peace (*friþ)* against breaches. 1 Æthelberht, c. 1, (*Mæthl friþ II gylde*—breach of the peace [to be compensated] twofold); *see* ATTENBOROUGH, *supra* note 108, at 4, 5.

198. *See* ATTENBOROUGH, *supra* note 108 at 118, 119) (citing 2 Edward the Elder (c.899-925), Introduction: [*Be fryþe*—Concerning the peace] Edward and his councillors met at Exeter to consider how "the peace for which they were responsible could be better kept than it had been" (*hu heora friđ* [our peace, or their peace–my translation] *"betere beon mæhte, þonne hit ær đam wæs"*); *see also* the Dooms of Edmund (c. 942-946), 3 Edmund ("This is the decree that King Edmund and his bishops together with his *witan* formulated. . . for the maintenance of peace and the swearing of an oath.")

199. ATTENBOROUGH, *supra* note 108, at 152, 153 (Literally, "our peace").

200. Prologue to 5 Æthelstan, referring to Æthelstan, in ATTENBOROUGH, *supra* note 108, at 142-143, 153, 152.

guarantee of peace (*cyninges hand-grið*) had become the king's *friþ* (king's peace) which was seen as the domestic *friþ* of the nation. The king demanded and secured a universal peace (his people shall *friþ* all that he will *friþ*),[201] and this King's Peace was underwritten by the king's *mund* or protection.[202] There was thus a great combined effort by king and people to put the realm under a standing peace, and every magnate and reeve at Æthelstan's councils after the initial establishment of the peace took an oath that "he will hold all that *friþ* that King Æthelstan and his *witan* set False"[203] By the time of Æthelræd,[204] the king and his *witan* could say:

> Let us all furthermore give earnest attention to the improvement of the peace and the improvement of the coinage. The improvement of the peace [shall be] such as is best for the husbandman (*bondan*) and worst for the thief. . . .And the repair of boroughs (*burhbote)* and the repair of bridges (*bricbote*) shall be earnestly pushed in every region; and likewise the maintenance of the army and the fleet, whenever there is need, as may be ordered in our common necessity.[205]

Corresponding to the establishment of the King's Peace is the extension of the king's *wite* (penalty/punishment)[206] beyond disobedience to the ancient *trinoda necessitas*,[207] to include failure to obey the king's express dooms, orders or laws. This too, began in the reign of Edward the Elder,

201. 2 Æthelstan, c. 20, § 3, (quoted in J. E. A. JOLLIFFE, THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND, 116 (Adam and Charles Black, London, 4th edn., 1967).

202. 2 Æthelstan, c. 25, § 2, (referred to in JOLLIFFE, *supra* note 202).

203. 6 Æthelstan, c. 10, (quoted in JOLLIFFE, *supra* note 202).

204. Æthelred, king 979-1016.

205. 6 Æthelred, c. 31, c. 32; these last mentioned three obligations were the *trinoda necessitas*, the duty and obligation lying on all freemen and landholders to the king. Note that the *trinoda necessitas* are linked to necessity for the realm.

206. SWEET'S ANGLO-SAXON PRIMER, 12 (Clarendon Press, 9th ed. 1967) (1882).

207. These were three ancient obligations owed to the king in return for his protection (*mund*)—*fyrdwite* [army-service], *burhbote* [duty of repairing strongholds], and *bricote* [duty of repairing bridges (and, according to Blackstone, roads—WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, A Facsimile of the First Edition of 1765-1769, with an introduction by STANLEY N. KATZ, {University of Chicago Press, Chicago, 1979, in 4 Volumes}, Vol. I, Book 1, Chapter 7, 253 and 346:—trinoda necessitas: *pontis repario, arcis constructio, et expeditio contra hostem*, sourced to 2 CO. INST., 31, and to MATTHEW PARIS, and to COWELL'S INTERPRETER, tit. castellorum operatio). Maitland also suggests that there may have been a fourth ancient obligation (to be subject to a *wite*, or appropriate penalty for wrongdoing)—F. W. MAITLAND, DOMESDAY BOOK AND BEYOND, THREE ESSAYS IN THE EARLY HISTORY OF ENGLAND, (Cambridge University Press, Cambridge, 1897, reissued Fontana Library, 1960, 2nd impression, London : Fontana Library, Collins, 1961), 324. *See also* Laws of Ine, c. 45, and 6 Æthelred, c. 32.

where on certain counts a man would have to pay his *wite* for any disobedience (*oferhyrnesse*)[208] to such orders. These orders included king's Ordinances made by writing and proclamation[209] directing compliance by judges with the written laws of Alfred and Ine,[210] and also directing them to have regard to the *folcriht* or common law.[211] They also included laws made by the king with all his councillors for the peace (*Be fryþe*).[212] The categories of *oferhyrnesse* were extended by Æthelstan[213] (notably to include fines for corrupt judgements)[214] and Cnut.[215] This marked the beginning of the king's official responsibility for the enforcement of law and order. No longer were the *folc-moots* responsible for the judgements they secured in accordance with the law, with the king's *mund* being available only when those remedies failed or were insufficient. Now the judgements in the moots were enforced by the king's ban. Thus the king's *mund*, the king's *wite*, the *trinoda necessitas*, and the king's *oferhyrnesse* came to form an homogenous body of law enforcement. In addition, outlawry, once the ultimate sanction of the *folc-moots*, came formally into the hands of the king, investing him with the final sanction of law[216]—Æthelræd stated that an outlaw in one district was an outlaw throughout the kingdom.[217]

By the time of Cnut, king of the Danes, and king by election and conquest of England and later Norway,[218] the struggle by the king and the people to create peace and order, was substantially completed. This was achieved through a mix of leadership, loyalty, and by the authority of mutual and voluntary agreement. There was an agreed national peace, the

208. 1 Edward c. 1, § 1 ("*ðonne sy he cyninges oferhyrnesse scyldig. . .*") in ATTENBOROUGH, *supra* note 108, at 114; 2 Edward, 2, in Attenborough, *supra* note 108, at 118; *see also* JOLLIFFE, *supra* note 201, at 109.

209. *Eadweardes gerædnesses* [*Be dome 7 spræce*]—Edward's Judgements/Ordinances, by judgement/written judgement and speech/proclamation—see ATTENBOROUGH, *supra* note 108, at 114, 115.

210. 1 Edward, Preamble "*. . .ðæt ge deman swa rihte domas swa rihtoste cunnon, 7 hit on ðære dombec stande*," in ATTENBOROUGH, *supra* note 108, at 114, 204, n. 4.

211. ATTENBOROUGH, *supra* note 108, at 114, 115 (citing 1 Edward, Preamble "*Ne wandiað for nanum ðingum folcriht to geregceanne* [nor shall you for any cause fail to interpret the public law/folkright]").

212. ATTENBOROUGH, *supra* note 108, at 118 ("Concerning the peace"—2 Edward, Preamble.

213. 1 Æthelstan , c. 5; 2 Æthelstan, c. 20, 5 Æthelstan, c. 1 §2-4, in ATTENBOROUGH, LAWS OF THE EARLIEST ENGLISH KINGS, *supra* note 108, at 124, 136, 152-5; STUBBS, *supra* note 165, 74-5. For commentary, *see* JOLLIFFE, *supra* note 201, at 109-10.

214. 5 Æthelstan, c. 1 §3, in ATTENBOROUGH, *supra* note 108, at 154-5.

215. 2 Cnut, c. 29; JOLLIFFE, *supra* note 201, at 109-10.

216. 1 Æthelræd, 1, at 9A; 1 Æthelræd, 1, at 13 ("outlawry had come to apply not only to heinous crimes against the law, such as killing within the kin, or betrayal of a lord by his man, but also to many offences of violence, and theft.") For a discussion of outlawry, consult JOLLIFFE, *supra* note 201, at 3-4, 107-8; *see also* Frederick Pollock, *The King's Peace*, 1885 LAW Q. REV. 37-55, 43 ("The peace-breaker, if he fled, was reckoned an outlaw;. . .") The only available remedies for an outlaw lay either in the king's pardon, or in sanctuary under the church laws and liberties—*see* PLUCKNETT, *supra* note 92, at 430-31.

217. The condemned man was to be outlaw *wið eal folc*—1 Æthelræd, 1, 9A (text available in THORPE, *supra* note 105, at 120.

218. JOLLIFFE, *supra* note 201, at 105; *see also* PETER HUNTER BLAIR, AN INTRODUCTION TO ANGLO-SAXON ENGLAND, 100-101 (Cambridge Univ. Press, 1966) (1956).

King's Peace,[219] and a uniform and intensive legal and administrative system to make the peace effective was in place.[220] And the king controlled the enforcement of the laws through his reeves, high-reeves, sheriffs and *ealdormen*, and by receipt of the *wites* (penalties, usually monetary) for breach of his edicts (king's *mund*, the king's *wite*, the *trinoda necessitas*, and the king's *oferhyrnesse*). From the time of Alfred, reeves and *ealdormen* were required to know the written law, and to impose it upon the courts or moots.[221] Cnut bound both Saxon and Dane by the law of Edgar.[222] He styled himself "king of the whole of England,"[223] seeing his realm as one nation, based on the uniform applicability of his laws to all peoples within his jurisdiction, rather than discriminating between areas of territory and jurisdiction on any racial basis.[224] He divided the territory into four large areas which were administered by earls,[225] but ordered his law to be observed over all England.[226] He warned:

> If any be so bold, clerk or lay, Dane or English, as to go against God's laws and against my royal authority, or against secular law, and be unwilling to make amends, and to alter according to my bishop's teaching, then I pray Thurcyl my earl, and also command him, that he bend that unrighteous one to right if he can; if he cannot, then will I with the strength of us both that he destroy him in the land or drive him out of the land, be he better, be he worse. . .[227]

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219. It should be noted that the idea of the peace dying with the king is implicit in the dooms of the Anglo-Saxon kings, each of whom establishes his own peace: *see* dooms of successive kings Edward the Elder and Æthelstan.

220. In the forms of the shire and the hundred; *see* JOLLIFFE, *supra* note 201, at 116, 136-7. The hundred originated from a "voluntary hundred" or "*friþ*-guild"; under Alfred it became the common administrative system over the individual smaller schemes such as the Danish *trithings* and *wapentakes*, the Celtic *scirs*, and the *lathes* and *rapes*. The hundred heard all pleas at first instance, except those of book-land (land granted by charter or *boc* (book)). The shire would appear to have developed from the older concept of boroughs, which in turn had replaced the older great ealdormanries. The king's officers were reeves (boroughs), high-reeves (certain greater boroughs), and sheriffs (shires, or the modern counties). All of this discussion is greatly indebted to JOLLIFFE, *supra* note 201, at Chapter 2, ii, ("*The Kingdom of Britain.*")

221. *See* discussion *supra* accompanying notes 171-184; *see also* JOLLIFFE, *supra* note 201, at 112 (citing to ASSER, DE REBUS GESTIS, at 106. The doomsmen (of the moot) gave judgement, the reeve demanded it of them, and executed the judgement made.

222. *Anglo-Saxon Chronicle*, 1018D (" *Dene and Engle wurdon sammæle æt Oxanaforda to eadgares Lage*"); *see also* BLAIR, ANGLO-SAXON ENGLAND, *supra* note 218, at 100-101.

223. JOLLIFFE, *supra* note 201, at 105; text for the latter in THORPE, ANCIENT LAWS, *supra* note 105, at 153 (Cnut, 1027, Proem." *Canutus, rex totius Angliae*; 1 Cnut (Ecclesiastical Laws), Proem: *Cnut cyning, ealles Englalande cyning*").

224. JOLLIFFE, *supra* note 201, at 105 (quoting Consiliatio Cnuti (1110-1130), Proem., 2 "*Rationabili consideratione decrevit, quatinus sicut uno rege, ita et una lege universum Angliae regnum regeretur*"); *see also* the discussion in WORMALD, MAKING OF ENGLISH LAW, *supra* note 143, at Table 3.1, 111, 196, 319, 346-48.

225. BLAIR, *supra* note 218, at 102 (Wessex (*eorl* Godwine), Mercia (*eorl* Leofric), Northumbria (*eorl* Siward), East Anglia (*eorl* Thorkell the Tall)).

226. II Cnut (Secular Laws), Prologue.

227. WORMALD, *supra* note 143, at Table 3.1, 111, 196, 346-48, 319. *See also* STUBBS, *supra* note 165, at 75-76 (reproducing a text of a Charter of Cnut of probably 1020, from which this quotation is

Cnut stated that he would "make full *friþ* through the power that God has given me."[228] In this he was successful. By the time of Edward the Confessor, the King's Peace and the laws and their enforcement were entrenched, and he could speak of "all the pleas that belong to my crown."[229] These pleas included not only any rents or taxes owed to him as king (*sac* and *soc*, *scot* and *gafol, feorm*, *team* and *toll*), but also the financial penalties imposed for any offences against the King's Peace, which by that time included, in addition to the *trinoda necessitas* [*fyrdwite, bricbote*, and *burhbote*], *faestengewerce*, *flymenafyrmðe*, forsteall, *fyrdsocne*, *gryðbryce*, *hamsocn*, *infangeneþeof*, *mundbryd, oferhyrnesse*, *weardwite*, and *wergild.*[230] These pleas were a coherent jurisdiction appurtenant to the crown, and separate from the folkright, part of the *cynescipe* (the special powers of the king)[231] or the *cyneryhta* (rights of the king).

Cnut, like his Anglo-Saxon predecessors, clearly saw the law as being two-fold—the law was comprised of God's laws,[232] and secular laws. The King's Peace then was not merely a mechanism by which unity was established among disparate peoples in the process of forging a State, but was also a direct outcome of the responsibility of the king to protect his people, and to obey and enforce God's laws, as he had sworn to do at his coronation.

In conclusion then, by 1066 under the Anglo-Saxon kings there was:

> —a bond between king and people, by virtue of the people's involvement in selection and ratification of the king, and the king's oath of governance[233]
> —a continuing commitment by each king through the oath of governance to maintain the peace and protect his people, outlaw iniquity impartially, and to do justice with equity and mercy.

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taken (sourced to *York Gospel Book*, MS.)); *and see* JOLLIFFE, *supra* note 201, at 105, who sources this to Cnut, 1020, 9-10.

228. Quoted in JOLLIFFE, *supra* note 201, at 116 (referring to Cnut, 1020, at 3); *and see* STUBBS *supra* note 165,at 75 (Charter of Cnut: ". . .and I do to you to wit that I will be a kind lord and unfailing in God's rights and to right secular law. I took to my remembrance the writing and the word that archbishop Lyfing brought me from Rome from the pope, that I should everywhere maintain the glory of God and put down wrong, and work full peace by the might that God would give me. . .".

229. *Ealle tha gyltas tha belimpeth to mine kinehelme; omes forisfacturae quae pertinent ad regiam coronam meam*: *quoted in* JOLLIFFE, *supra* note 201, citing to Charter of Edward the Confessor to Ramsey, from J. EARLE, LAND CHARTERS, 344. *See also* Grant by Edward the Confessor to Westminster Abbey, 1056, *reproduced in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY: VOL. I: A SELECTION OF DOCUMENTS FROM AD 600 TO THE INTERREGNUM, 31-32 (C. Stephenson & F. G. Marcham, eds., Harper & Row rev. ed. 1972) (citing THORPE, DIPLOMATARIUM, 368 ff.: "I have granted. . . free of *scot* and *gafol*, with all things pertaining,. . .*sac* and *soc*, *toll* and *team*, *infangeneþeof*, *blodwite* and *weardwite*, *hamsocn*, *forsteall*, *gryðbryce* and *mundbryce*, and all the rights which there belong to me.. . .")

230. For meanings, see Glossary to KELLY, *supra* note 3, or any Anglo-Saxon Dictionary. .

231. JOLLIFFE, *supra* note 201, at 105, 111.

232. See, the Ten Commandments in the Introduction to the Laws of Alfred; Dooms of Edward and Guthrum, § 1 (In the first place they declared they would love God. . .), ATTENBOROUGH, *supra* note 108, at 103.

233. For text and translation of the oaths, see *infra* Part VII, at Annex A-B.

—promulgation of laws and judgement of cases in accordance with dooms issued by the king, or made by his judges in accordance with his instructions in accordance with his oath, which included application of the folkright
—a system of taxes, and a recognizable regime of identification of ownership of property and land
—a means of rectifying infractions of the kings dooms, or disputes over the ownership of property or land.

C. William I and Continuity of the Laws.

After William of Normandy defeated Harold II in 1066, he became king of the English. But in doing so, he adhered to what had become the common legal processes in England. He was elected by the *witan,*[234] as had been Edward and Harold before him.[235] And he swore the same oath as had his predecessors, promising "to protect the holy churches of God and their governor, and to rule the whole kingdom subject to him with justice and kingly providence, to make and maintain just laws, and straitly to forbid every sort of rapine and all unrighteous judgments."[236] Not only was this a significant step in legitimating William's kingship, as he swore the same oath that his Saxon predecessors had, but it also established the continuity of the law.[237] William proceeded to make enactments establishing his peace,[238] and formally enjoining the upholding of the laws of Edward the Confessor: "This likewise I wish and enjoin: that in [cases affecting] lands, as in all other matters, all shall keep and hold the law of King Edward, with the addition of those [amendments] which I have made for the benefit of the English people."[239]

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234. WILLIAM STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGIN AND DEVELOPMENT, 280 (Clarendon Press 4th ed. 1883) (1875).

235. DARLINGTON & MCGURK, *supra* note 111; *see also* Florence, a monk of Worcester, compiler of 1 FLORENTI WIGORNIENSIS MONACHI CHRONICON EX CHRONICIS, 229 (B. THORPE ed., English Historical Society, 1849) (1848) *translated in* THOMAS FORESTER, THE CHRONICLE OF FLORENCE OF WORCESTER, 171, (Henry G. Bohn ed. & trans., AMS Press 1968) (1854).

236. MCGURK, *supra* note 111, at 607.

237. *See* H. G. RICHARDSON, & G. O. SAYLES, THE GOVERNANCE OF MEDIEVAL ENGLAND FROM THE CONQUEST TO THE MAGNA CARTA, 26-29 (Edinburgh Univ. Press, Edinburgh, 1964) (1963) ("The Normans had little statecraft and little foresight. The Normans had very little to teach even in the art of war, and they had very much to learn. They were barbarians who were becoming conscious of their insufficiency. That the Normans had little statecraft and little foresight, that they had very little to teach and very much to learn, seems to us the obvious conclusion from their history; but so to declare we recognise, is to fly in the face of settled convictions of successive generations of historians to whom the Conqueror has appeared as a heroic figure of almost superhuman proportions.") This observation is endorsed by J. H. BAKER, *supra* note 144, at 12 ("The Norman invaders were warlike, uncultured and illiterate. . .they found in England a system of law and government as well developed as anything they had left in Normandy. Certainly they had no refined body of jurisprudence to bring with them.").

238. William I, 1 and 3, from the Latin, in F. LIEBERMANN, DIE GESETZE DER ANGELSACHSEN, Text und Übersetzung, Unveränderter Neudruck der Ausgabe 1903-1916, (Scientia Aalen, Sindelfingen, Germany, 1960), 3 Vols., I: 486f., *reprinted in* STEPHENSON & MARCHAM, *supra* note 229, at 37.

239. William I, 7; from the Latin, in LIEBERMANN, *id.,* as reproduced in STEPHENSON and MARCHAM, *id.* .; and see William I, Charter of London, 1066, quoted in WORMALD, MAKING OF ENGLISH LAW, *supra* note 65, 398-99: ". . .you shall be worthy of all those laws that yet were in the time of King Edward;. . ."

Were William a conqueror, (though many have disputed this)[240] legally he had dominion over all English lands and people; if he were not, then he took control by virtue of his recognition by the people and his oath of governance. He asserted his lordship over every acre of land in England (the *terra regis*),[241] which formed the basis of a very large increase in the revenues of the crown.[242] While those who had fought against William had their lands confiscated, he was prepared to allow those who recognized him as king to redeem their land, which in many ways was akin to the old Anglo-Saxon *wite*. The Anglo-Saxons were, according to Elizabeth Hallam, "well accustomed to literate administration using their native tongue, and to the holding of royal surveys of tax liability, the results of which had been preserved in the royal treasury at Winchester."[243] Earlier disputations over land, "at least since Cnut's reign" had often been settled by reference to the tax records.[244] There was, then, a pre-existing tax system and records thereof, prior to the Conquest, as well as an established fiscal administration for control of the coinage and levying tax, which was preserved and utilized by the Normans.[245] However, Edward the Confessor had imported numerous Normans to positions of influence, and after the Conquest and the resumption of much Anglo-Saxon land, and subsequent changes in title due to rebellions by Saxons and Norman alike, and depredations by Norman earls, by 1085 the ownership of land had become of some importance for the purposes of levying taxes. Consequently, William organized a great survey by royal commissioners of the ownership of land, both at the time of Edward the Confessor, and the present (1085) ownership, which included improvements, cultivation, tenants, its worth then and now, and whether additional tax could be levied; the survey was completed by the end of 1086, and became known to history as the *Domesday Book*, (*The Book of the Day of Judgement*).

So far as other laws were concerned, what had become known as the pleas of the crown under the Confessor broadened under William. They included not only those offences for which the king and his *witan* had laid down a pecuniary penalty payable to the crown in forfeiture for the breach

240. *See* Hale *supra* note 60, at 4 (referring to ". . .the coming in of King *William* I, commonly called, *The Conqueror*"). *See also* CAMPBELL, JOHN and WORMALD, *supra* note 111.

241. JOLLIFFE, *supra* note 201, at 139, and the sources quoted there in note 2.

242. JOLLIFFE, *supra* note 201, at 183 (discussing Chapter 3). Note also, that a king by conquest could at his discretion impose any of his laws upon the conquered, and as fruits of victory could take any land which he had conquered, which now came under his possession and sovereignty. Moreover, in the light of this precept, William I's undertaking to maintain the laws of Edward the Confessor is much more than a merely conciliatory gesture.

243. ELIZABETH M. HALLAM, DOMESDAY BOOK THROUGH NINE CENTURIES, 16 (Public Records Office, Thames and Hudson by permission of HMSO, London, 1986) (*relying on* H. R. LYON, THE GOVERNANCE OF ANGLO-SAXON ENGLAND, 118-22 (1983); J. Campbell, *Observations on English Government from the tenth to the twelfth century*, 39-54 TRANSACTIONS OF THE ROYAL HIST. SOCIETY, 5th ser., xxv. 1975); S. P. J. Harvey, *Domesday Book and its predecessors*, 1971 ENG. HIST. REV. 753-73 lxxxvi; M CLANCHY, MEMORY TO WRITTEN RECORD, ENGLAND 1066-1307, 11-17 (1979).

244. HALLAM, *supra* note 243, at 18 (*relying on* S. P. J. Harvey, *Domesday Book and Anglo-Norman Governance*, 175-93 TRANSACTIONS OF THE ROYAL HIST. SOCIETY, 5th ser., xxv (1975).

245. HALLAM, supra note 243, at 19.

of the King's Peace or the law,[246] but also what the Normans had known as "the pleas of the sword"[247]—offences which were held to be committed against the crown, where the crown was the avenger together with or on behalf of the injured party or his kin.[248] The term *folcriht* begins to disappear after the Conquest, but it is replaced in Latin by the term *consuetudo Angliae* (customs of England),[249] or later, we have seen above, by the term 'common right' or '*ius commune*' in Glanvill and Bracton.[250] And while all of the British *cyneryhta* were retained by the Conqueror, they were gradually transmuted into other names; nevertheless, as Maitland points out, the principle that all temporal justice is the king's was making itself good as against 'tribalism, communalism [and] feudalism.'[251] Thus in Latin and French, the common laws by which the king governed were referred to as *leges, consuetudines et libertates*[252] (laws, customs and liberties/franchises) or *les leyes et custumes et franchises*[253](laws and customs and liberties/franchises).

So far as the law and the economy, and the administration of justice and government were concerned, the Conquest was, in fact, distinguished by an extraordinary continuity from the preceding Anglo-Saxon reigns.

D. The Continuity of the Law Continues.

Subsequent Anglo-Norman kings also took the English coronation oath and promised to maintain the peace,[254] *and also* reiterated a commitment to the maintenance of the old laws of their predecessors; the outstanding example of this was Henry I's Coronation Charter of 1100.[255]

William II, obtained the throne only on the basis of his coronation oath;[256] while his successor in turn, Henry I, in effect purchased the crown by seizing the Treasury and by swearing in his coronation oath and coronation charter to

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246. *Jura quae rex super omnes homines habet, and propria placita regis*, some 40 in number. *See* Leges Henrici Primi, 10 and 52 (*quoted in* JOLLIFFE, *supra* note 201, at 110).

247. JOLLIFFE, *supra* note 201, at 110 (referring to *Placita gladii*, pleas of the sword of the Norman Duke).

248. PLUCKNETT, *supra* note 92, at 427.

249. JOLLIFFE, *supra* note 201, at 177.

250. *See, supra* text accompanying notes 160-166 (discussing *ius commune* and common right).

251. MAITLAND & POLLOCK, *supra* note 137, at I:528-9.

252. . . .*leges et consuetudines ab antiquis iustis et deo deuotis regibus . . . leges consuetudines et libertates a glorioso rege edwardo* (LIBER REGALIS 13-14th centuries); *note also* Henry II coronation charter 1154 ("e*t libertates et liberas consuetudines quas rex Henricus I*").

253. *les leys et custumes et franchises* [French version of *Liber Regalis*] from SIR MATTHEW HALE, *Prerogativa Regis*, The Prerogatives of the King, 1640-1660, 66 (D. E. C. YALE, ed., Selden Society 1976).

254. *E.g.* STUBBS, *supra* note 234, at I: §105, 321] (stating that William II, who promised to preserve justice and equity and mercy throughout the realm, would defend against all men the peace, liberty, and security of the churches.)

255. Latin available in STUBBS, *supra* note 165, at 116 (translated in STEPHENSON & MARCHAM, *supra* note 229, at 46-48).

256. STUBBS, *supra* note 234,at I: §105, 321

> . . .in the first place make the holy church of God free. . . And I henceforth remove all the bad customs through which the kingdom of England has been unjustly oppressed;. . . I establish my firm peace throughout the whole kingdom and command that it henceforth be maintained. I restore to you the law of King Edward, together with those amendments by which my father, with the counsel of his barons, amended it. . .'[257]

This coronation charter, referred to sometimes as the Charter of Liberties,[258] was in many ways a precursor of *Magna Carta*:[259] it is said that Henry's Coronation Charter was rediscovered by Stephen Langton, who persuaded the barons to require a similar charter from John.[260]

One significant feature of Henry I's coronation charter was that which reflected his oath that the king was empowered to make the laws—but he must abrogate bad laws and evil customs, and make and hold fast to good laws.[261] (This was but a logical extension of Alfred's culling of the laws some centuries earlier). Henry and his successors up to Henry III all issued a coronation charter, adopting or reinforcing the laws of his predecessor; or at least, those of them which were seen to be good and just.[262] Such a coronation charter replaced the specificity of the laws of, for example, Alfred, Cnut or William I, which individually ensured the keeping of their predecessors' laws.[263] The practice also arose at this time, of "restoring" to the people, by virtue of the coronation charter,[264] the old and good laws of the king's predecessor(s), thus ensuring the continuity of the law.[265]

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257. STEPHENSON & MARCHAM, *supra* note 229, at 46-48 (translated from the Latin text in LIEBERMANN, DIE GESETZE, *supra* note 238, at I: 521 ff).

258. STUBBS, *supra* note 234, at 116-119.

259. *Magna Carta*'s first provision, like that of Henry I's coronation charter, was that "the English church shall be free. . ."

260. Blackstone related how the chronicler Matthew Paris attributed the movement towards the charter as a result of the sudden discovery of Henry I's Coronation Charter of Liberties. SIR WILLIAM BLACKSTONE, THE GREAT CHARTER, vii (1759) (quoted in W. S. MCKECHNIE, MAGNA CARTA, A COMMENTARY ON THE GREAT CHARTER OF KING JOHN, 48 (2d ed. 1914) (1905); RAY STRINGHAM, MAGNA CARTA : FOUNTAINHEAD OF FREEDOM, 10, 119 (Aqueduct Books 1966) (saying it was Stephen Langton, Archbishop of Canterbury, who discovered Henry's charter, and read it to the barons in November 1214); *See also* PLUCKNETT, *supra* note 92, at 22-26.

261. *See* the reference in H. G. Richardson, *The Coronation in Medieval England*, in TRADITIO, 111 (1960), from LIEBERMANN, *supra* note 238, at I: 521 ("*Deinde iurat quod leges malas et consuetudines peruersas . . . delebit et bonas custodiet.*")

262. *See* the Coronation Charters of Henry I, Stephen, and Henry II in STUBBS, *supra* note 165.

263. LAWS OF ALFRED, c. 49, § 9; Cnut required adherence to the laws of Edgar. ANGLO-SAXON CHRONICLE, 1018D ("*Dene and Engle wurdon sammæle æt Oxanaforda to eadgares Lage*" quoted *in* JOLLIFFE, *supra* note 201, at 105; *see also* BLAIR, *supra* note 218, at 100-01; William I, 7, discussed *supra* in text accompanying notes 238-242.

264. *See* FORESTER, *supra* note 235, at 207-08 (describing the coronation of Henry I, "*legem regis Eadwardi omnibus in commune reddidit, cum illis emendationibus quibus pater suus illam emendavit,* [he restored the laws of king Edward to all in common, with such amendments as his father had made. . .]"; *see also* Latin quotation from FLOR. WIG. II 46 ff. in Hoyt, *supra* note 165, at 239.

265. This practice derived from William I's undertaking to apply the laws of his predecessor, Edward the Confessor; continued by Henry I, who also undertook to restore those laws of Edward which had been abrogated by his immediate predecessor, William Rufus; and by Henry II, who undertook to

Again in times of upheaval, Stephen took the crown, and maintained his right by virtue of his coronation oath and anointing, as did Henry II, and both of them confirming their oaths in a coronation charter specifically reiterating the confirmation of the grants of liberties and customs to the church and people issued by their predecessors, and confirming also the laws of their predecessors,[266] Henry I and Edward the Confessor. Henry II appears to have added an additional promise to those rehearsed above in that he promised to maintain the rights of the crown.[267] Moreover, either as an adjunct to this promise, or as an addition, he appears to have undertaken to restore the inheritances of those displaced in the civil war of Stephen's reign.[268]

It was in the reign of Henry II that the writer whom English lawyers call Glanvill—Rannulf Glanvill who was Henry's Chief Justiciar[269] from 1180—wrote his *Tractatus de legibus et consuetudinibus regni Anglie* between 1187 and 1189.[270] Glanvill speaks of "the laws and customs of the realm" [*legibus,* and later, *iusta et regni consuetudinibus*]; he speaks of the king as the author of peace; that the king and his judges exercise their judgements with impartiality to all levels of society, and with equity, justice, and truth; he says the king is guided by the laws and customs of the realm; that the laws are those decided upon in council on the advice of the magnates [*in concilio*] and which have the king's agreement and his support. These statements are in absolute accord with the statements of the Anglo-Saxon kings like Alfred, and later kings of England like Cnut, as well as with the oaths of William I and Henry I. This is not any new development of law, but rather an evolution of the common law which had been extant for over 200 years, and completely in accord with Henry II's undertaking in

restore the laws of his predecessor Henry I. *See, Carta Regis Henrici Secundi*, Charter of Liberties, in STUBBS, *supra* note 165, at 158, from STATUTES OF THE REALM, Charters of Liberties, 4 —probably issued at Henry II's coronation: STUBBS supra note 165, at 157.

266. *See* STUBBS, *supra* note 165, at 142, from STATUTES OF THE REALM, Charters of Liberties, 4. Stephen's charter was witnessed by William Martel, and endorsed the charters and laws of Henry I and Edward the Confessor. For Henry II, *see* STUBBS, *supra* note 165, at 158 (Henry specifically endorsed the charter granted by his predecessor, Henry I; his charter was witnessed by Ricardo de Luci.)

267. RICHARDSON, *The Coronation in Medieval England, supra* note 261, at 166 (after rehearsing all the evidence, states: ". . . for it seems hardly open to doubt that Henry II gave an undertaking [to safeguard the rights of the Crown] at his coronation"); *see also* Ernst H. Kantorowicz, *Inalienability*, 29 SPECULUM 488-502 (1954); H. G. Richardson, *The English Coronation Oath*, 24 SPECULUM, 44, 47 (1949) (referring to Henry II's son's oath ("the young king Henry," who died in an insurrection against his father and did not succeed) which included a promise to "maintain unimpaired the ancient customs of the realm," which in part gave rise to the controversy with a'Becket, as the pope said that this oath "imperilled the authority of the church."

268. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, *supra* note 144, at 231; And see the Royal web-site, History of the Monarchy, The Angevins, Henry II Curtmantle, at http://www.royal.gov.uk/output/Page62.asp.

269. The equivalent of a combination of the modern positions of Chief Justice and Prime Minister: MAITLAND, *supra* note 140, at 13.

270. GLANVILL, *supra* note 120.

his coronation charter to maintain the liberties promised in Henry I's Coronation Charter[271]—this was a necessary period of consolidation after the civil war between Stephen and Matilda.

Moreover, in all of these successions, the old common law of selection and endorsement and binding of kings continued—A. L. Poole has stated:

> of the six kings who followed the Conqueror, Richard I alone succeeded in accordance with the strict rule of hereditary succession, and the title of four of them was challenged by a rival. Until the chosen successor was crowned he was merely *dominus*, the territorial lord and head of the feudal state; after his coronation he became *rex* with all the attributes of regality.[272]

He notes that the Empress Matilda (who was never crowned or took the oath) usually adopted the style *Anglorum domina*. Both Richard I and John in the interval between their election and coronation use the title *dominus Angliae*.[273] Mere recognition by the people was not sufficient for a person to be monarch (witness the case of Matilda, Lady of the English who was acclaimed by the people, but never took the oath nor was ever crowned). It was the taking of the oath which bound the monarch to the people, and which enabled the making, reiteration, and continuation of the law—indeed, the coronation charters fitted precisely the terms of the old Anglo-Saxon oath.

From the time of Henry III onwards, there were no more issues of coronation charters. Kings continued to take the coronation oath, but there was no longer any need for a coronation charter, as its basic statement of principles, as for example outlined in Henry I's coronation charter, were enshrined in the revised *Magna Carta*, which was reaffirmed by each king at the beginning of his council meetings.[274]

Henry III venerated the Anglo-Saxon Saint Edward the Confessor; he rebuilt Edward's Westminster Abbey;[275] and in 1269; Henry had Edward's body 'placed ceremonially in a new coffin which he shouldered himself

271. Henry II Charter of Liberties, *in* STUBBS, *supra* note 165, at 158; *see also* Richardson, *supra* note 261, at 166.

272. A. L. POOLE, FROM DOOMSDAY BOOK TO MAGNA CARTA, 1087-1216, (3rd ed. 1993) (1951).

273. POOLE, *supra* note 272, at 3, n. 1.

274. *E.g.* the first *parlement* of Richard II, ROTULI PARLIAMENTORUM, III, 5-7 [French] (reprinted in STEPHENSON & MARCHAM, *supra* note 229, at 232-34); I Henry 4, c. 1 (STATUTES AT LARGE, 393); 2 Henry 6, c. 1 (STATUTES AT LARGE, 466); *see also* the note in STATUTES AT LARGE which refers to CO. LITT. f. 81, and the list of confirmations of the Charter, which number thirty after the Confirmation of 25 Edward 1, up to the time of the fourth year of Henry V; all of these citations are cap. 1—that is, the first statement or enactment of the meeting of that council or *parlement*.

275. Edward the Confessor had been responsible for enlarging the church on a grand scale, but he was too ill to attend its consecration in December 1065, and he died a month later. Henry III, in addition to rebuilding the Abbey, built within it a great shrine to Edward. *See*, THE OXFORD ILLUSTRATED HISTORY OF THE BRITISH MONARCHY, 650-651 (JOHN CANNON & RALPH GRIFFITHS eds., Oxford Univ. Press 1992) (1988).

when it was carried to its new exotic shrine in Westminster Abbey.'[276] Henry III named his eldest son Edward, a name theretofore unbestowed upon the sons of the Anglo-Norman dynasties.[277] The authors of *The Oxford Illustrated History of the British Monarchy* assert that Saint Edward the Confessor's name was inserted in the coronation oath shortly after Edward's body had been interred in the shrine.[278]

Whether it was the doing of Henry III or not, the idea of the kings "restoring" the old laws of their predecessors (in particular those of Edward the Confessor) and of upholding the good laws and putting down the bad, was formalised in the liturgical records of the coronation oath from that time thence in what became known as the *Liber Regalis*[279] in a new first clause to the oath:

> Will you grant and keep, and by your oath confirm, to the people of England, the laws and customs to them granted by the ancient kings of England your righteous and godly predecessors, and especially the laws, customs, and privileges granted to the clergy and people by the glorious king [saint] Edward, your predecessor?[280]

This first proposition referring to "the laws. . ." of Edward the Confessor (who in fact actually made no laws at all) and their maintenance was reproduced for centuries by clerics and ecclesiaticals in the *Liber Regalis* and its offshoots, and was definitely included in the coronation oath sworn by the Stuart kings in the seventeenth century.[281] What this indicates is that the monarchs and the people saw the laws as being grounded in the Anglo-Saxon laws, and as having evolved over the centuries as Hale had understood. It therefore appears that the law common to the people of England was not merely judge-made law, but also laws made by the king

276. CANNON & GRIFFITHS, *supra* note 275, at 202.

277. MARC BLOCH, THE ROYAL TOUCH, SACRED MONARCHY AND SCROFULA IN ENGLAND AND FRANCE, 94 (Routledge & Kegan Paul 1973) (translated from LES ROIS THAUMATURGES, 1961, Max Leclerc et Cie).

278. CANNON & GRIFFITHS, *supra* note 275, at 202.

279. The Third Recension of the English Coronation order was compiled some time in the twelfth century, (c.1100) and used to be referred to as the coronation order for Henry I. Various versions of a more elaborate oath which refers to St Edward the Confessor are to be found from the thirteenth century onwards, and these are usually referred to as the recensions of the Fourth English Coronation Order, which reached its final version c. 1351-1377, which final version is known as the LIBER REGALIS (Royal Book, King's Book, Book of the King's Office). For text *see* LEGG, ENGLISH CORONATION RECORDS, *supra* note 91, at 81 (Latin Text); translation of Oath, at 117.

280. For text, *see infra* Part VII, Annex, C. *See also* STUBBS, *supra* note 234, at §249, (citing to FOEDERA, CONVANTIONES, LITERAE ET CUJUSCUNQUE GENERIS ACTA PUBLICA, 32-36; PARL. WRITS. II. ii. 10; STATUTES, i. 168); *see also* STEPHENSON & MARCHAM, *supra* note 229, at 192, from the French, STATUTES OF THE REALM, I, 168; HALE, PREROGATIVA REGIS, *supra* note 253, at 66. (There is also an Anglo-French version of the *Liber Regalis* oath dating from as early as 1272). *See* THREE CORONATION ORDERS, (J. WICKHAM LEGG, ed., 1900) (No. 40 from a manuscript, No. 20, belonging to Corpus Christi College, Cambridge).

281. *See infra* Part VII, Annex, D; *see also* EDWARD, EARL OF CLARENDON, 2 HISTORY OF THE REBELLION AND CIVIL WARS IN ENGLAND, V, 292 ff. (Clarendon Press 1958) (1888) (report by Clarendon of Charles I's own words about his oath).

and his advisers, prerogative and customs, again just as Hale had understood in the seventeenth century.

VI. CONCLUSION

In essence then, what we have is a continuity of the laws from Anglo-Saxon times secured by the oath of governance. This oath gave power to the monarchs, and simultaneously set limits on that power, while directing how the power should be exercised. Each monarch undertook to govern according to just laws and customs, to make judgements according to justice with mercy and equity, to maintain the peace, and to make good laws and root out old bad ones. Up until the time of Henry III, the Norman/English kings promised to maintain the good laws of their predecessors. From the time of Henry III until the time of the revolution of 1688 (OS) [1689 NS], monarchs specifically gave an undertaking to maintain the laws, customs and liberties/privileges which had anciently been recognized as law (particularly those of Edward the Confessor), to judge with law and mercy, and to maintain the laws of God. While in 1689 the reference to the laws of the Confessor was dropped, and redrafted to suit the Commons' Protestant mentality, the oath retained the basic undertaking: the monarch must

- govern according to statutes, laws and customs.
- cause law and justice in mercy to be executed in all judgements.
- maintain the laws of God

— and the Protestant Reformed Religion established by law in England.[282]

It has remained basically unchanged since. Elizabeth II swore to:

- govern all Her realms according to their respective laws and customs.
- cause law and justice in mercy to be executed in all judgements.
- maintain the laws of God

— and the settlement of the Church of England, and the doctrine, worship, discipline, and government thereof as by law established in England.[283]

Moreover, the modern oath still echoes fundamental principles as enunciated in the Anglo-Saxon oath:[284]

- to preserve peace to the "Church of God" and all the (Christian) people.

282. *See infra* Part VII, Annex E; *see also, supra* text accompanying notes 101-102.

283. *See infra* Part VII, Annex F; *see also, supra* text accompanying note 102.

284. *See* discussion *supra* text accompanying notes 97-111

- to forbid rapine [reaf-lac robbery usually with violence, plundering] and all injustice to all people of all conditions.
- to do right [riht, right, equity, aequitem] and mild-heartedness [mild-heortnisse/compassion/mercy] in all judgements.[285]

Clearly, from Anglo-Saxon times, governance was and is concerned with the maintenance of the peace, the eradication of injustice, the application of justice and right to all persons equally, and to ensure that right was done with equity and mercy in all judgements. These principles found their articulation in the oath of governance which sets out the parameters within which governance occurs—it both confers and confines all aspects of law-making power necessary for good government and both embodies and bequeaths rule by law.[286] This oath, it is argued, is the source of the law common to the English and now the United Kingdom's and Australia's people.

The common law, the law by which the people are governed in common, is not just judge-made law. It consists in fact of those laws made by the monarch or Head of State and his or her advisers in the Houses of Parliament (or earlier, with the three estates of lords spiritual and temporal and the commons); the prerogative; certain customs; and decisions of judges. *All* this common law must be directed towards the maintenance of the peace and protection of the people, and must strive for the right, the *riht*, the just. As Hale said, the common law is the "just, known, and *common Rule of Justice and Right between Man and Man*, within this Kingdom."[287]

Therefore it can be seen that any concentration upon the "common law" as being "judge-made law," or the law as made by courts, is a misconception. While lawyers might wish to see the "common law" as the result of their own (it must be admitted, very considerable) endeavours over the years, constitutional history shows that this just cannot be the case—the people, legislators and monarchs have played an even more significant role. (Were it not for people and legislation, what would there be for judges to judge upon? Were it not for the relationship between monarchs and the people, where would be great constitutional achievements like Alfred's *domboc*, the *Magna Carta*, the *Declaration of Breda*,[288] the *Bill of Rights*,[289]

285. *See* text of the oath and translation, *infra* Part VII, Annex A-B.

286. *See* sample texts of oaths, *infra* Part VII, Annex; *see also* discussion and observations, *supra* note 44, and text accompanying notes 4-14.

287. *See supra* text accompanying note 72.

288. Charles II, *Declaration of Breda*, 1660 (4/14 April, 1660, in the twelfth year of his reign); *Lords Journals*, XI, 7-8 (here the king in the interests of the maintenance of the peace, pardoned all offenders against the law during the Interregnum, except for those regicides still living, and required that no previous such breach of the law should be held against any). *See* J. P. KENYON, THE STUART CONSTITUTION, DOCUMENTS AND COMMENTARY, 357-358 (Cambridge Univ. Press 1965). The general pardon received the imprimatur of parliament in the *Act of Oblivion*, 12 Car. 2, c. 11 (1660).

289. Bill of Rights 1 W. & M., §. 2, c. 2 (1689).

the 1776 American Declaration of Independence, the extension of the franchise in the nineteenth century, the establishment of the independent Commonwealth of Australia[290]?) While the profession might well see the "common law" through the prism of its experience, this is not its essence. While it may be convenient in lay terms to describe the English adversarial system as "common" law, as opposed to the inquisitorial "civil" law, it is an oversimplification then to assert that only judge-made law is the common law. A historical analysis of the development of English law shows that "common law" has gone hand in hand with the monarch's oath of governance. This oath, while conferring judicial power, confers other powers as well. For any to think that the *source* of power can conveniently be overlooked, while aggrandizing *one* of the powers (that exercised by the judges) necessary to maintain justice and right in the kingdom or the nation state to being in the position of the *only* power capable of doing so, is in this writer's view unconstitutional, ahistorical, injudicious, and dangerous.

The theory of "common law constitutionalism" as expounded by those scholars and judges referred to earlier,[291] needs, in this writer's respectful opinion, to look beyond the judiciary and take into account constitutional history and the development of the democratic polity within the ambit of the oath of governance. To do otherwise not only smacks of hubris and arbitrariness, but is surely both unwise and injudicious. Moreover, legal historians need to embrace constitutional history with open arms, rather than allow it to become mistress to historians and political scientists. Constitutional history is not the same as legal history and it certainly is far from antiquarian; rather it is of vital importance to present day democracy, governance, law, and jurisprudence. And certainly it demonstrates that it is not the judicial bench that represents "an hieroglyphic of the laws."

290. Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict. c. 12.

291. *See supra* text accompanying notes 15-55.

VII. ANNEX: OATHS OF GOVERNANCE — SAMPLE TEXTS[292]

A. *732-736:Pontifical of Echberht, Archbishop of York*[293]

1. *Tria precepta* or the *Promissio Regis*

Missa pro rege in die benedictionis[294]

Ad Populum.

Omnipotens sempiterne deus nostri regni defende regem atque rectores. ut in tua dextra confidentes. fiant hostibus suis fortiores uniuersis. per dominum[295]

Primum mandatum regis ad populum hic uidere potes.[296]

Rectitudo regis est noutier ordinati et in solium sublimati. haec tria precepta populo christiano sibi subdito precipere.

in primis ut aeclesia dei et omnis populus christianus ueram pacem seruent in omni tempore. Amen

Alia.[297]

Aliud est ut rapacitates et omnes iniquitates. omnibus gradibus interdicat. Amen.

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292. Oaths were always taken in the vernacular (i.e. English). *See* for a comprehensive discussion of the oaths of the English monarchs, MRLL KELLY, KING AND CROWN, *supra* note 3. For the vernacular, *see also* H. G. Richardson, *The English coronation Oath*, 24 SPECULUM 46 (1949) and Richardson, *The Coronation in Medieval England*, *supra* note 261, at 171. The Latin versions are those in the coronation ordines prepared usually by ecclesiastics. The oath itself was written on a piece of paper, in the language of the time, and usually kept by the Archbishop of Canterbury: but being ephemeral, many of the originals have been lost—*see* Richardson, *Coronation in Medieval England*, *supra* note 261.

293. The authoritative text is in TWO ANGLO-SAXON PONTIFICALS, 1 ff., 110-113 (H. M. J. Banting, ed. Boydell Press 1989) (from MS Lat. 10575 in the Bibliotheque Nationale). Latin texts of the English coronation oath dating from possibly as early as the 8th century exist in the Leofric Ordo (Bodleian MS 579) and the Pontifical of Echberht/Egbert, Archbishop of York (732-766), and certainly are extant in the 10th century. *See* Pontifical of Echberht, BANTING, *id.*; *see also* the Pontifical also in L. G. W. LEGG, *supra* note 91, at 9; Coronation ordine for Æthelred II (king, 978-1016) in ARTHUR TAYLOR, THE GLORY OF REGALITY: AN HISTORICAL TREATISE OF THE ANOINTING AND CROWNING OF THE KINGS AND QUEENS OF ENGLAND, (R. & A. Taylor, 1820) (Appendix to Book IV, No. 2, from MS. Cotton Claud. A iii, 395); this ordo also at LEGG, *supra* note 91, at 15.

294. LEGG, *supra* note 91, at 3.

295. LEGG, *supra* note 91, at 8-9.

296. LEGG, *supra* note 91, at 9, n. 1 (noting that the Echberht pontifical includes these words as a heading).

297. This is inserted at this point in The Egbert Pontifical, as published in BANTING, *supra* note 293, at 113.

Tertium est ut in omnibus iudiciis. aequitem et misericordiam precipiat. . ut [per hoc[298]] sibi et nobis indulgeat misericordiam suam clemens et misericors deus. Amen.[299]

The Mass for Kings on the Day of their Hallowing[300]

Over the people.

Almighty and everlasting God, defend our king and the rulers of our land, that trusting in thy right hand, they may be stronger than all their enemies, through our Lord Jesus Christ. Amen.[301]

This is the first decree of a king to his people.

It is the duty of a king newly ordained and enthroned to enjoin on the Christian people subject to him these three precepts:

First, that the Church of God and all the Christian people preserve true peace at all times. Amen.

Secondly, that he forbid rapacity and all iniquities to all degrees. Amen.

Thirdly, that in all judgements he enjoin equity and mercy, that therefore the clement and merciful God may grant us his mercy. Amen.[302]

298. BANTING, *supra* note 293, (*per hoc* appears here in the Bradshaw manuscript instead of *sibi et.*)

299. LEGG, *supra* note 91, at 9 (noting in n. 1 that the Echberht pontifical has the word "Amen" after each of the three clauses).

300. *Id.* at 9 (English translation).

301. *Id.* at 13 (English translation).

302. *Id.* at 13.

2. 7th-13th century Anglo-Saxon oath

This oath, uttered in the vernacular (Anglo-Saxon) was taken by Æthelstan,[303] Edgar,[304] Æthelred,[305] Cnut,[306]Edward the Confessor,[307] Harold II,[308] and William I,[309] William II,[310] Henry I,[311] and Stephen.[312]

> *Ðis ge-writ is ge-writen stæf be stæfe be þam ge-write, þe Dunstan arceb. sealde urum hlaforde æt Cingestune, þa on dæg þa hine man halgode to cinge, 7 for-bead him ælc wedd to syllane, butan þysan wedde, þe he up on Cristes weofod léde, swa se b. him dihte:*
>
> *On þære halgan þ rinnesse naman, Ic þreo þing be-háte cristenum folce, 7 me under-ðeoddem:*

303. *See* D. H. TURNER, THE CLAUDIUS PONTIFICALS, xxxiii; as referred to in the Introduction to the Egbert Pontifical, as printed in BANTING, *supra* note 293, at 925.

304. Edgar, king, 959-975, oath taken 973, *see* 1 LIEBERMANN, *supra* note 238, at 217; *see also* TAYLOR, *supra* note 293, (Appendix to Book IV, No. 3, from MS. Cott. Cleop. B xiii, 56, at 405-406). For another text, *see also* THE RUTLAND PAPERS, ORIGINAL DOCUMENTS ILLUSTRATIVE OF THE COURTS AND TIMES OF HENRY VII AND HENRY VIII, *selected from the private archives of His Grace the Duke of Rutland, &c. &c. &c.*, (William Jerdan ed., Camden Society 1842); New York: AMS Press reprint with the permission of the Royal Historical Society, 1968), Preface xi., which he ascribes to Edgar (king, 959-975). Janet L. Nelson, (*see* reference, *supra* note 167, at 29-48) (making a strong case for existence of the English coronation rite from at least the early 9th century, and very possibly earlier).

305. LEGG, *supra* note 293, at 23 (taken from manuscript at Corpus Christi College, Cambridge; [Corpus Christi College, Cambridge, MS. 146. p. 138]); *see also* J. WICKHAM LEGG, *supra* note 280, at 53 (text of oath at 53, notes at xxxviii-xliii). He gives the texts of all variations of the second recension of the English coronation order and their location at xxxix. *See also* 1 STUBBS, *supra* note 234, at 164, n. 3, (citing to KEMBLE, SAXONS, ii. 36, who in turn sources it to RELIQUE ANTIQUAE, ii. 194, to MASKELL, MONUMENTA RITUALIA, iii. 5, and to MEMORIALS OF S. DUNSTAN, at 355).

306. *See* M. K. LAWSON, CNUT, THE DANES IN ENGLAND IN THE EARLY ELEVENTH CENTURY, 129 (Longman Group 1993) (citing to ENCOMIUM EMMAE REGINAE, xlvii-xlviii (A. Campbell, ed., Camden Society, Third Series, lxxii, London, 1949)).

307. *See* ERNST H. KANTOROWICZ, THE KINGS TWO BODIES, A STUDY IN MEDIEVAL POLITICAL THOUGHT, 346-347 (Princeton Univ. Press, 1997) (1957) (reprinted version with an introduction by William Chester Jordan); *see also* 1 LIEBERMANN, *supra* note 238, at 635, 11, 1A, 2, and 640, 13, 1A.

308. 1 FLORENTI WIGORNIENSIS MONACHI CHRONICON EX CHRONICIS, 224 (quoted in Hoyt, *supra* note 165, at 239).

309. DARLINGTON & MCGURK, *supra* note 111, at entry for 1066; *cf.* THE ANGLO-SAXON CHRONICLE, D, at entry for 1066; *see* THE ANGLO-SAXON CHRONICLES, (Michael Swanton, ed. Phoenix Press 2000). John of Worcester is followed by SIMEON OF DURHAM, 2 HISTORIA REGUM IN SYMEONIS MONACHI OPERA OMNIA 182 (T. ARNOLD ed., Rolls Series 1882), who is in turn followed by HOWDEN, 1 CHRONICA MAGISTRI ROGERI DE HOUEDENE 116 (W. STUBBS, ed., Rolls Series 1871); *see also* Hoyt, *supra* note 165, at 239; MAITLAND, *supra* note 140, at 98-99; 1 STUBBS, *supra* note 234, at §95; H. G. Richardson & G. O. Sayles, *Early Coronation Records*, 13 BULLETIN OF THE INSTITUTE OF HIST. RESEARCH 129, 137 (1936) (1936); *see also* DAVID C. DOUGLAS, WILLIAM THE CONQUEROR, 248 (Univ. of California Press 1964).

310. 1 STUBBS, *supra* note 234, at §105; MAITLAND, *supra* note 140, at 99.

311. LEGG, *supra* note 91, at 30; *see also* 2 ENG. HIST. DOCUMENTS 176; Hoyt, *supra* note 165, at 242, n. 28 (referring to *Annales monasterii de Waverleia*, in 2 ANNALES MONASTICI 208 (H. R. LUARD, ed., 1869).

312. GESTA STEPHANI, 6-7, 10-11 (K. R. Potter & R. H. C. Davis eds., OMT, 1976); *see also* MARJORIE CHIBNALL, THE EMPRESS MATILDA: QUEEN CONSORT, QUEEN MOTHER AND LADY OF THE ENGLISH, 75-77 (Blackwell Publishers, 1999) (1991) (citing GILBERT FOLIAT, LETTERS AND CHARTERS OF GUILBERT FOLIAT, 60-66 (Adrian Morey and C. N. L. Brooke eds. Cambridge, 1967); JOHN OF SALISBURY, HISTORIA PONTIFICALIS, 83-86 (M. Chibnall ed., OMT, 1986).

{This writing is written letter by letter after the writing which Dunstan the archbishop delivered to our lord at Kingston on the day on which they consecrated him as king, and he forbad him to give any pledge {promise/covenant}except this pledge {promise/covenant}which he laid on Christ's altar, as the bishop {directed him}.

In the name of the holy Trinity, I promise three things to Christian people, and bind myself to them:[313]}

án ærest, Þ Godes cyrice 7 eall cristen folc minra ge-wealda soðe sibbe healde;

oðer is Þ reaf-lac 7 ealle unrihte þing eallum hádum forbeode;

þridde, Þ ic be-háte 7 be-beode on eallum dómum riht 7 mild-heortnisse, þæt us eallum arfæst 7 mild-heort God þurh Þ his ecean miltse for-gife, so lifað 7 rixað.[314]

{First, that the Church of God and all the Christian people preserve true peace at all times.

The next is that I will forbid rapine [*reaf-lac*, robbery usually with violence, plundering] and all injustice [*unrihte þing*, unjust/unright things] to people of all conditions [all manner of persons irrespective of rank];

The third, that I vow and promise in all [my] judgments justice [*riht*, right, equity, *aequitem*] and mild-heartedness [*mild-heortnisse*/compassion/mercy], that the gracious God through his everlasting mercy may forgive us all, who shall live and reign[315]

[Old English version said to be for Edgar [959-975]; Latin version said to be c. 8th century and certainly extant in the 9th.]

B. 11-12th Century Additions to the Oath (England)

Edward the Confessor appears to have added an additional promise to those rehearsed in the oath above—this was 'to restore all the rights, dignities, and lands which his predecessors "have alienated from the Crown of the realm," and to recognise it as his duty "to observe and defend all the

313. Translation in brackets mine.

314. See LIEBERMANN *et al.*, *supra* note 304.

315. Translation from LEGG, *supra* note 91 (translation in brackets mine from the Old English text).

dignities, rights, and liberties of the Crown of this realm in their wholeness. 'maintain the rights of the crown."'[316]

1154 Henry II: Charter of Liberties—made at time of coronation; scholars suggest that Henry's oath, while undertaking to confirm and restore the laws of Henry I, also contained an undertaking to safeguard the rights of the crown.[317]

Carta Regis Henrici Secundi[318]

> *HENRICUS Dei gratia Rex Angliae, dux Normanniae et Aquitanniae, et comes Andegaviae, omnibus comitibus, baronibus et fidelibus suis Francis et Anglicis salutem Sciatis me ad honorem Dei et sanctae ecclesiae et pro communi emendatione totius regni mei, concessisse et reddidisse et praesenti carta mea confirmasse Deo et sanctae ecclesiae et omnibus comitibus et baronibus et omnibus hominibu meis omnes concessiones et donationes et libertates et liberas consuetudines quas rex Henricus avus meus eis dedit et consessit. Similiter etiam omnes malas consuetudines quas ipse delevit et remisit, ego remitto et deleri concedo pro me et haeredibus meis. Quare volo et firmiter praecipio quod sancta ecclesia et omnes comites et barones et omnes mei homines, omnes illas consuetudines et donationes et libertates et liberas consuetudines habeant et teneant, libere et quiete, bene et in pace et integre, de me et haeredibus meis, sibi et haeredibus suis, adeo libere et quiete et plenarie in omnibus sicut Rex Henricus avus meus eis dedit et concessit et carta sua confirmavit Teste Ricardo de Luci apud Westmonasterium.*

C. Liber Regalis 14th-16th century (England)

1351-1377[319] ***Liber Regalis***[320] : (*The Royal Book*, or *The Book of the Royal Office*) —'Fourth' English Coronation Order. This oath appears to have been taken by Edward I, Edward II, Edward III, Richard II, Henry IV. Latin text and translation from Leopold G. Wickham Legg, *English Coronation Records*, (Westminster: Archibald Constable & Company Limited, 1901), 87 (Latin Text); translation of oath,117; Legg uses a manuscript held by the Dean of Westminster, dated at about the time of Richard II. French text from Sir Matthew Hale, *The Prerogatives of the King*, 1640-1660, D. E. C .Yale, ed., (London: Selden Society, 1976), at 66, sourced to [*rot. claus.*] *1 E. 2, m. 10 dorso*, and to *Cal. C. R. (1307-1313)*, and *Foedera*, iii, 63. For an almost identical French text, see Robert S. Hoyt, in

316. KANTOROWICZ, KING'S TWO BODIES, *supra* note 307, at 346-7 (referring to 1 LIEBERMANN, *supra* note 238, at 11,1A,2, 13,1A and to "Richardson," in BULLETIN OF THE INSTITUTE OF HISTORICAL RESEARCH, xvi,7, 10(1938); TRANSACTIONS OF THE ROYAL HIST. SOCIETY at xxiii, 149 f (4th ser. 1941).

317. Richardson, *supra* note 261, at 166; *see also* KANTOROWICZ, *supra* note 307, at 167.

318. STUBBS, *supra* note 165, at 158.

319. This is the date ascribed to it by Richardson, *supra* note 261, at 112, 149.

320. LEGG, *supra* note 91, at 81 ff (Latin Text, translation at 112 ff).

'The Coronation Oath of 1308: the background of "Les Leys et les Custumes",' *Traditio*, Vol. XI, 1955,. 235-257, 237, sourced apparently to *The Parliamentary Writs and Writs of Military Summons*, (ed. Francis Palgrave, n.p. 1827-34) II, 2 Appendix, 10.

> *Hic est ordo secundum quem Rex debet coronari pariter et inungi.*[321]
>
> This is the order according to which a king must be crowned and anointed.
>
> * * ** * *
>
> *Memoratus uero princeps nocte precedente coronacionis sue diem uacabit contemplatacioni diuine et oracioni intime considerans ad quem apicem sit uocatus. qualiter is per quem reges regnant ad populi sui ac plebis christiane gubernavionem ipsum specialius preelegit. Et cogitet illud sapientis. Prinsipem te constituerunt noli sed esto in illis quasi unus ex illis. Et cogitaet dignitatum regalem sibi a deo prestitam tanquam homini mortali et ipsum iccirco ad tantam sublimitatem uocatum a deo ut ecclesie catholice sit defensor. fidei christiane dilator. ac regni sui et patrie sibi a deo commisse secundum uires protector. . . .*[322]
>
> Now the said prince on the night before the day of his coronation shall give himself up to heavenly contemplation and to prayer, meditating to what a high place he has been called, and how he through whom kings reign has appointed him in especial to govern his people and the Christian folk. And let him ponder on these words of the wise man: If thou be made the master, lift no thyself up, but be among them as one of the rest. [Ecclesiastes. xxxii. I.] And let him meditate that the royal dignity has been given him by God as to a mortal man, and consider that he has been called to so high a position by God to be a defender of the Catholic Church, an extender of the Christian faith, and to protect, so far as he can, his realm and country which God has given into his charge. . . .
>
> * * ** * *
>
> *Et si dictus abbas de medio fuerit sublatus. at alius in abbatem eiusdem loci nondum fuerit confirmatus qui dictum offium rite non poterit adimplere: aut dictus abbas aliunde*

321. LEGG, *supra* note 91, at 81.
322. LEGG, *supra* note 91, at 82.

fuerit impeditus quominus illud officium ualeat exequi : tunc eligatur unus ex assensu prioris et conuentus dicti monasterii qui per omnia sit ydoneus dictum principem in huiusmodi obseruanciis informare secundum modum et consuetudinem ab antiquissimis temporibus hactenus usitatum. Hiis sub uniuersorum concordia peractis. . . .[323]

On the day appointed on which the new king is to be consecrated, early in the morning the prelates and nobles of the realm shall assemble in the royal palace of Westminster to consider about the consecration and election of the new king, and also about confirming and surely establishing the laws and customs of the realm.

When this has been done with the agreement of all . . . [details about the king's seat]

* * ** * *

Finito quidem sermone ad plebem metropolitanus uel episcopus eundem mediocri distinctaque uoce interroget.[324]

The sermon [to the people] ended, the Metropolitan or Bishop shall ask the king in a moderate and distinct voice:

Si leges et consuetudines ab antiquis iustis et deo deuotis regibus plebi anglorum concessas cum sacramenti confirmacione eidem plebi concedere et seruare uoluerit. et presertium leges consuetudines et libertates a glorioso rege edwardo clero populoque concessas.[325]

Sieur, voilez vous graunter et garder et per votre serement confirmer au people d'Angleterre les leyes et les custumes a eux graunteesper les ancients royes d'Angleterre vos predecessors droitures et devotes a Dieu et nomement les leys et custumes et franchises graunts au clergy et au people par le glorieus roy [seint] Edward votre predecessor ?[326]

Will you grant and keep, and by your oath Confirm, to the people of England, the Laws and Customs to them granted, by the Kings of England your lawfull and religious predecessors; and namely the Laws Customs and franchises granted to the Cleargy and to the people by the glorious King St. Edward your predecessor?

323. LEGG, *supra* note 91, at 83.
324. LEGG, *supra* note 91, at 87.
325. LEGG, *supra* note 91.
326. The French text from HALE, *supra* note 253, at 66,

Dicto autem principe se promittente omnia premissa concessurum et seruaturum.

Respons. Jeo les graunt et promett.

I grant and promise to keep them.

Tunc exponat ei metropolitanus de quibus iurabit ita dicendo.

And when the king says that he will grant and keep all these things the metropolitan shall set forth to him what he shall swear, saying:

Seruabis ecclesie dei cleroque et populo pacem ex integro et concordiam in deo secundum uires tuas.[327]

Respondabit. Seruabo.

Sieur, garderez vous a Dieu et a Sainct Eglise et au clergy, et au people paix et accord au dieu entyrement selonc votre poer ?

Respons. Jeo les garderai.

Will you keep peace and godly agreement, entirely according to your power, both to God, the holy Church, your [the] Cleargy and your [the] People?

Response. I will keep it.

Facies fieri in omnibus iudisiis tuis equam et rectam iusticiam et discrecionem in misericordia et ueritate secundum uires tuas.

Respondabit. Faciam.

Sieur ferrez vous faire en toutes vos judgements, ovele et droit justice et discretion in misericord et verite a votre poer ?

Respons. Jeo le ferrai

Will you to your power cause Lawe Justice and Discretion, in Mercy and truth, to be executed in all your Judgements?

Response. I will.

327. LEGG, *supra* note 91, at 88.

Concedis iustas leges et consuetudines esse tenendas. et promittis eas per te esse protegendas. et ad honorem dei roborandas quas uulgus elegerit secundum uires tuas.

Respondabit. Concedo et promitto.

Sieur, grant wus a tener et garder les leyes et les custumes droitures, lesquelles le communaute de votre royalme aura esleu, et les defender et afforceres alhonor de Dieu a votre poer?

Respons. Jeo le grant et promett.

Will you grant to hold and keep, the Laws and rightful Customs, which the Commonalty of this your Kingdom have: and will you defend, and uphold them to the honour of God, so much as in you lieth?

I grant and promise so to do.

Sequitur admonitio episcorum ad Regem, et legatur: ab uno episcopo coram omnibus, clara voce dicendo.

Domine rex a uobis perdonari petimus ut unicuique de nobis et ecclesiis nobis commis canonicum priuilegium as debitam legem atque iusticiam conseruetis. et defensionem exhibeatis: sicut rex in suo regno debet unicuique episcopo. abbatibus et ecclesiis sibi commis.

Then shall follow the admonition of the Bishops to the king, to be read by one of the Bishops before all in a loud voice saying:

Our Lord and King : We beseech you to pardon and to grant, and to preserve unto us and your [the] Churches committed to our Charge, all Canonical privileges, and due Law and Justice ; And that you would protect and defend us, as every good King in his Kingdom, ought to be Protector, and Defendor of the Bishops, and the Churches under their government.

Respondabit. Animo libenti et deuoto promitto uobis et perdono quai unicuique de uobis. et ecclesiis uobis commissis canonicum priuilegium et debitam legem atque iusticiam seruabo. et defensionem quantum potuero adiuuante domio exhibebo sicut rex in suo regno unicuique episcopo abbatibus et ecclesiis sibi commissis per rectum exhibere debet.

He shall answer:

With a willing and devout heart, I grant My Pardon; and promise that I will preserve, and maintain to you, and the Churches committed to your Charge, all Canonical Privileges, and due Law, and Justice ; and that I will be your protector and defendor to my power, by the assistance of God, as every good King in his Kingdom, in right ought to protect and defend the Bishops and Churches under their government.

Adiciatur predictis interrogacionibus que iusta fuerint prenunciatis omnibus supradictis : dictus princeps confirmet se omnia predicta esse seruaturum : sacremento super altare coram cunctis protinus prestito.

Then shall be added to the aforesaid questions what is just ; when all the above have been put, then the prince shall confirm them by swearing upon the altar in sight of all that he shall keep all the above.[328]

Finito uero ympno sequatur hec oracio.

This done, the Metropolitan or Bishop shall kneel devoutly, and in a loud voice begin the hymnFalse

D. 1603-1685 Stuart Oath (England)—James VI and I

JURAMENTUM REGIS JACOBI, *1603*[329]

Archbishop. Sir, will you grant and keep and by your oath confirm to your people of England the laws and customs to them granted by the kings of England your lawful and religious predecessors; and namely the laws, customs and franchises granted to the clergy and to the people by the glorious king, St Edward, your predecessor, according and conformable to the laws of God and true profession of the gospel established in this kingdom, and agreeing to the prerogatives of the kings thereof and to the ancient customs of this realm?

King. I grant and promise to keep them.

328. LEGG, *supra* note 91, at 117.

329. This text is taken from the Tanner manuscript, in the Bodleian Library (Tanner MSS. (Bodl.), vol. 94, f. 121, as reproduced at 391 in SELECT STATUTES AND OTHER CONSTITUTIONAL DOCUMENTS ILLUSTRATIVE OF THE REIGNS OF ELIZABETH AND JAMES I, (G. W. Prothero, ed., Oxford Clarendon Press 1963) (1894); This oath was also taken by Charles I, Charles II and James II and VII; this last king however omitted the following two italicised words from the fourth clause—"Sir, will you grant to hold and keep the *Laws and* rightful customs which the commonalty of this your Kingdom have,. . ."

A. Will you keep peace and agreement entirely, according to your power, both to God, the holy church, the clergy and the people?

K. I will keep it.

A. Will you to your power cause law, justice and discretion in mercy and truth to be executed in all your judgments?

K. I will.

A. Sir, will you grant to hold and keep the laws and rightful customs which the commonalty of your kingdom have, and to defend and uphold them to the honour of God, so much as in you lieth?

K. I grant and promise so to do.

Sequitur adminitio episcoporum, &c.

Our lord and king, we beseech you to grant and preserve unto us and every one of us and the churches committed to our charge all canonical privileges and due law and justice, and that you would protect and defend us as every good king in his kingdom ought to be a protector and defender of the bishops and churches under their government.

K. With a willing and devout heart I promise and grant that I will preserve and maintain to you and every of you and the churches committed to your charge all canonical privileges and due law and justice, and that I will be your protector and defender to my power by the assistance of God, as every good king in his kingdom ought to protect and defend the bishops and churches under their government.

E. 1689 William III and Mary I English Oath

Will You solemnely Promise and Sweare to Governe the People of the Kingdome of England and the Dominions thereto belonging according to the Statutes in Parlyament Agreed on and the Laws and Customs of the same?[330]

I solemnly Promise soe to doe.

Will You to Your power cause Law and Justice in Mercy to be Executed in all Your Judgements.

I will.

330. Coronation Oath Act, 1 W. & M. c. 6, 1688 (1689 NS) (Eng.).

Will You to the utmost of Your power maintaine the Laws of God the true Profession of the Gospell and the Protestant Reformed Religion established by Law? And will you preserve unto the Bishops and Clergy of this Realme and to the Churches there committed to their Charge all such Rights and Priviledges as by Law doe or shall appertaine unto them or any of them.

All this I Promise to doe.

After this the King and Queene laying His and Her Hand upon the Holy Gospells, shall say,

The things which I have here before promised I will performe and Keepe

Soe help me God.

F. 1953 Elizabeth II Oath (All Realms)

The Queen having returned to her Chair (her Majesty having already on Tuesday, the fourth day of November, 1952, in the presence of the two Houses of Parliament, made and signed the Declaration prescribed by Act of Parliament), the Archbishop standing before her shall administer the Coronation Oath, first asking the Queen,[331]

Madam, is your Majesty willing to take the Oath?

And the Queen answering

I am willing.

The Archbishop shall minister these questions; and the Queen, having a book in her hands, shall answer each question severally as follows:

Archbishop. Will you solemnly promise and swear to govern the Peoples of the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand, and the Union of South Africa, Pakistan and Ceylon, and of your Possessions and the other Territories to any of them belonging or pertaining, according to their respective laws and customs?

Queen. I solemnly promise so to do.

331. JOHN ARLOTT ET AL., ELIZABETH CROWNED QUEEN, THE PICTORIAL RECORD OF THE CORONATION, 53-54 (Odhams Press Limited, 1953).

Archbishop. Will you to your power cause Law and Justice, in Mercy, to be executed in all your judgements?

Queen. I will.

Archbishop. Will you to the utmost of your power maintain the Laws of God and the true profession of the Gospel? Will you to the utmost of your power maintain in the United Kingdom the Protestant Reformed Religion established by law? Will you maintain and preserve inviolably the settlement of the Church of England, and the doctrine, worship, discipline, and government thereof, as by law established in England? And will You preserve unto the Bishops and Clergy of England, and to the Churches there committed to their charge, all such rights and privileges, as by law do or shall appertain to them, or any of them?

Queen. All this I promise to do.

Then the Queen arising out of her Chair, supported as before, the Sword of State being carried before her, shall go to the Altar, and make her solemn Oath in the sight of all the people to observe the premisses: laying her right hand upon the Holy Gospel in the Great Bible, (which was before carried in the procession, and is now brought from the Altar by the Archbishop, and tendered to her as she kneels upon the steps), saying these words

The things which I have here before promised, I will perform, and keep.

So help me God.

Then the Queen shall kiss the Book, and sign the Oath.'

[Then follows the presentation of the Bible, the communion service, the epistle, the gospel, then the anointing]